85-1551

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et als.*,

Appellants,

v.

JEFFREY MAY, individually, *et als.*,

Appellees.

On Appeal from the United States Court of Appeals For the Third Circuit

JURISDICTIONAL STATEMENT

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151/87

Questions Presented

1. Whether a state statute which permits public school students, before the opening exercises of each school day, to observe a one minute period of silence to be used solely at the discretion of the individual student for quiet and private contemplation or introspection violates the establishment clause of the first amendment.

2. Whether in this first amendment establishment clause case the court of appeals erred, as a matter of law, by failing to engage in plenary review of the district court's findings under this Court's ruling in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984).

Parties to the Proceeding

Appellants: In addition to Alan J. Karcher, the appellants herein (defendants-intervenors-appellants in the court of appeals) are the New Jersey General Assembly, Carmen A. Orechio, as President of the New Jersey Senate, and the New Jersey Senate (hereinafter the "Legislature").

Saul Cooperman, the Commissioner of the New Jersey Department of Education, the New Jersey Department of Education, the Edison Township Board of Education and the Old Bridge Township Board of Education were all named as defendants in the original complaint, but took no active role in the proceedings before either the district court or court of appeals.

Appellees: In addition to Jeffrey May, individually, Jean Ross, as natural parent of Damon Ross, an infant, and Jean Ross, individually; Bonnie Schorske, as natural parent of Mark Tulloss, an infant, and Bonnie Schorske, individually; Brenda Butler, individually, and Gary Drew, individually, were appellees in the court of appeals.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutes and Constitutional Provisions Involved	2
Statement of the Case	3
A. Facts	3
B. Decision of the district court	5
C. Decision of the court of appeals	6
The Questions Presented are Substantial	8
I. The decision of the court of appeals, holding New Jersey's Moment of Silence Law unconstitutional based upon a finding that the legislative purpose in enacting the law was religious, was predicated upon an erroneous interpretation and application of the purpose prong of the Supreme Court's tripartite establishment clause test	12

PAGE

(a) The constitutional standard: the three-part test 12

(b) The ruling as to purpose 13

(c) The proper purpose analysis 21

II. The court of appeals erred in applying a "clearly erroneous" standard of review to this first amendment establishment clause controversy 25

Conclusion 29

APPENDIX:

A—Opinion of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126) 1a

B—Opinion of the United States District Court for the District of New Jersey 62a

C—Order of the United States District Court for the District of New Jersey 101a

D—Judgment of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126) 103a

E—Notice of Appeal to the Supreme Court of the United States and Proof of Service 106a

F—Assembly Bill No. 1064 ..... 110a

PAGE

Table of Authorities

Cases Cited

Arizona v. California, 283 U.S. 423 (1931) 17

Bartimo v. Horsemen's Benevolent & Protective Ass'n., 771 F.2d 894 (5th Cir. 1985) 28

Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985) 27

Bob Jones University v. United States, 461 U.S. 574 (1983) 26

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) ..... i, 7, 10, 11, 26-28

Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985) 27

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 21, 22

Epperson v. Arkansas, 393 U.S. 97 (1968) 23

Estate of Thorton v. Caldor, Inc., 105 S. Ct. 2914 (1985) 9, 20, 23, 29

Everson v. Board of Education, 330 U.S. 1 (1947) 24

Fletcher v. Peck, 10 U.S. 87 (1810) 16

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 16

Grosjean v. American Press, 297 U.S. 233 (1936) 16

Jacabellis v. Ohio, 378 U.S. 184 (1964) 28

Larson v. Valente, 456 U.S. 228 (1982) 21

Lebron v. Washington Metro Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) 27

PAGE

Lemon v. Kurtzman, 403 U.S. 602 (1971) 12, 21, 22, 25

Levine v. CMP Publications, Inc., 753 F.2d 1341 (5th Cir. 1985) 28

Lynch v. Donnelly, 465 U.S. 668 (1984) 9, 16, 22, 29

Marsh v. Chambers, 463 U.S. 783 (1983) 21

McCray v. United States, 195 U.S. 27 (1904) 17

McGowan v. Maryland, 366 U.S. 420 (1961) 21, 24

McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985) 27

Miller v. California, 413 U.S. 15 (1973) 27

Miller v. Fenton, 106 S. Ct. 445 (1985) 28, 29

Mueller v. Allen, 463 U.S. 388 (1983) 9, 19, 22

Olivieri v. Ward, 766 F.2d 690 (2d Cir. 1985) 28

Palmer v. Thompson, 403 U.S. 217 (1971) 18

Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue Service, 743 F.2d 148 (3d Cir. 1984) 26

Renton v. Playtime Theaters, Inc., 748 F.2d 527 (9th Cir. 1984), *rev'd*, 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986) 28

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 19

Sloan v. Lemon, 413 U.S. 825 (1973) 22

Stone v. Graham, 449 U.S. 39 (1980) 23

Tavoulareas v. Piro, Inc., 759 F.2d 90 (D.C. Cir. 1985) 28

United States v. O'Brien, 391 U.S. 367 (1968) 15-18, 28

PAGE

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 27

Wallace v. Jaffree, 105 S. Ct. 2479 (1985) 7-9, 19-24

Washington v. Davis, 426 U.S. 229 (1976) 16

Witters v. Washington Dept. of Services for the Blind, 106 S. Ct. 748 (1986) 29

United States Constitution Cited

First Amendment ..... *i, passim*

Fourteenth Amendment 2

Statutes Cited

28 U.S.C. §1254(2) 1

28 U.S.C. §2201 4

28 U.S.C. §2202 4

42 U.S.C. §1983 4

N.J.S.A. 18A:36-4 ..... 1, 2, 9, 13, 25

Rule Cited

Fed. R. Civ. P. 52(a) 7, 10, 11, 25, 27, 29

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PAGE

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On Appeal from the United States Court of Appeals For the Third Circuit

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 24, 1985, affirming the decision of the district court and declaring unconstitutional, under the establishment clause of the first amendment, N.J.S.A. 18A:36-4. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The majority and dissenting opinions of a panel of the United States Court of Appeals for the Third Circuit dated December 24, 1985 are reported at 780 F. 2d 240 (3rd Cir. 1985). (App. A 1a-61a).[1] The opinion of the United States District Court for the District of New Jersey dated October 24, 1983 is reported at 572 F. Supp 1561 (D.N.J. 1983). (App. B 62a-100a).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 24, 1985. (App. D 103a). The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by 28 U.S.C. §1254(2).

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[1]Reference herein to the opinions and judgments below will be by citation to the Appendix of this Jurisdictional Statement.

Statute and Constitutional Provisions Involved

Title 18A, New Jersey Statutes Annotated, Chapter 36-4 (West 1982), commonly referred to as the Moment of Silence Statute (hereinafter the "MOS"), provides that:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

The First Amendment to the United States Constitution (in pertinent part):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

A. Facts

The MOS was originally introduced in the New Jersey Assembly in March of 1982 as Assembly Bill 1064 by 55 sponsoring assembly persons. (App. F 110a). Initially, the Bill passed both the Assembly and the Senate and was forwarded to Governor Thomas Kean for signature. Governor Kean vetoed the Bill and returned it to the Assembly. On December 13, 1982, the Assembly voted to override the Governor's veto by a vote of 57 to 17, and on December 16, 1982, the Senate voted to override the veto by a vote of 27 to 8. The MOS became law immediately.

Aside from its text, the only published official statements by the Legislature regarding the MOS were contained in its preamble and in an official statement which accompanied the Bill when it was voted into law. Those statements provided respectively as follows:

> An Act to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.
>
> * * *
>
> This Bill allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student.

(App. F 110a).

Immediately after its enactment, the MOS was communicated to all school districts by the New Jersey Department of Education without administrative guidelines or comment. The MOS was implemented in some school districts prior to the 1982 Christmas recess and reaction to its enact-

ment and implementation by some students, parents and a teacher precipitated the filing of the instant lawsuit.

On January 10, 1983, plaintiffs-appellees (hereinafter the "plaintiffs"), parents, students and a teacher, brought suit against the Commissioner of the Department of Education, the New Jersey Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education, pursuant to the provisions of 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202, seeking declaratory and injunctive relief voiding as unconstitutional and preliminarily and permanently enjoining implementation of the provisions of the MOS. The plaintiffs alleged that the MOS violated the establishment clause of the first amendment; violated the due process provisions of the fourteenth amendment; was void on its face; and violated provisions of the New Jersey Constitution.[2]

With the filing of the complaint, plaintiffs moved for a temporary restraining order supported, *inter alia*, by plaintiffs' affidavits, a brief and an appendix of exhibits which included copies of previously considered legislation dating back to 1970 and selected newspaper articles purporting to report statements of various legislators, editors, and citizens with regard to both the MOS and prior bills, and the affidavit of Reverend Dudley E. Sarfaty setting forth his recollection of remarks he overheard during legislative debates prior to the Legislature's override votes of the Governor's veto. While the district court initially found the MOS both neutral on its face and not by its terms mandating prayer, the court nonetheless entered a

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[2] At trial, plaintiffs presented no evidence regarding alleged violations of the New Jersey Constitution and neither the district court nor the court of appeals addressed this particular claim in their respective opinions. The claim is therefore deemed abandoned.

temporary restraining order after an examination of the materials plaintiffs had submitted, which the court concluded revealed an improper legislative intent in enacting the MOS.

On January 18, 1983, in recognition of the fact that no named parties would actively oppose plaintiffs' suit, the district court permitted the intervention of Alan J. Karcher, in his representative capacity as the Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, in his representative capacity as President of the New Jeresy Senate; and the New Jersey Senate. Thereafter, the temporary restraints were continued by consent of the parties pending a hearing on the merits.

B. Decision of the district court.

Trial on the merits commenced on September 13, 1983. Plaintiffs presented live testimony from thirteen witnesses, by stipulation introduced the previously filed affidavits of the plaintiffs and, over the continuing objections of the Legislature, introduced a multitude of documents containing copies of bills previously considered by prior independent New Jersey legislatures dating back to 1970, newspaper articles containing statements of a handful of legislators, editorials, citizens' letters, photographs and news reports of the MOS' implementation. The plaintiffs' proofs consisted of predictions as to how the MOS might be used by teachers and students for religious purposes; what had allegedly been said by *some* legislators both during and outside legislative debates; the opposition positions of three educator associations; parent and student reactions to the law; the reaction of a teacher; and opinions as to the law's lack of educational utility. Two students described how the MOS had been implemented in their classrooms.

The Legislature produced testimony from five witnesses. The Legislature's proofs consisted of a psychologist who reported the results of his research project to determine the objective effect of a moment of silence exercise in actual operation; two Sayreville, New Jersey school teachers who described the operation of a moment of silence exercise in their school district for over 10 years; a professor of sociology and education who described the pedagogical utility of a moment of silence to create a transition between non-school and school; and a professor of journalism who testified regarding the inability to accurately determine public perception or reliably predict public reaction from examination of the news articles presented by the plaintiffs. The Legislature also presented a videotape of a December 17, 1982 WCBS-T.V. (New York) news report concerning the Sayreville practice described by the two teachers.

Based on findings of fact and conclusions of law embodied in an opinion filed on October 24, 1983 and reported at 572 F. Supp. 1561 (D.N.J. 1983), (App. B 62a-100a), the district court issued a decision granting plaintiffs' application for an order permanently enjoining the implementation of the MOS and declaring it unconstitutional on its face and as applied.[3]

C. Decision of the court of appeals.

Following briefing, the court of appeals (panel composed of Circuit Judges John Gibbons and Edward Becker and District Judge Marvin Katz, sitting by designation) heard

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[3] Despite its opinion, the order entered by the court failed to provide for a permanent injunction against implementation of the MOS, but instead merely declared the MOS unconstitutional. (App. C 101a).

oral argument on October 26, 1984. In June of 1985, the panel requested that the parties submit supplemental letter briefs commenting upon the effect, if any, that this Court's intervening decision in *Wallace* v. *Jaffree,* 105 S. Ct. 2479 (1985) had upon the issues then pending before the panel. After receipt of the parties' respective submissions, the panel heard reargument on August 13, 1985.

On December 24, 1985, a divided panel affirmed the district court's conclusion that the MOS was unconstitutional. Judge Gibbons, writing for the majority, sustained the district court's conclusion on a narrower ground, and by a markedly different analysis, than that employed by the district court. In the process, the majority opinion rejected the district court's analysis under both the "effect" and "entanglement" prongs, (App. A 16a-22a) and rested its decision solely on its interpretation of this Court's test under the "purpose" prong. (App. A 23a -30a).

Circuit Judge Becker, in a dissenting opinion, sharply broke with the majority over its interpretation of this Court's "purpose" test and concluded that the MOS was constitutional. (App. A 31a-61a). Judge Becker further disagreed with the majority analysis on the grounds that in reaching its conclusion that the MOS lacked a secular purpose, the majority had (1) either applied the incorrect standard of review in contravention to this Court's decision in *Bose Corp.* v. *Consumers Union,* 466 U.S. 485 (1984) (App. A 44a-47a) or (2) even assuming a more deferential standard of review was applicable under Fed. R. Civ. P. 52(a), the majority had inexplicably ignored sufficient relevant evidence in the record which revealed that the district court had clearly erred in finding that the MOS had no secular purpose. (App. A 58a- 60a).

The Questions Presented are Substantial

This case presents two substantial questions for decision by this Court. One question is of exceptional importance in the area of first amendment establishment clause jurisprudence. The other question raises the important issue of the proper standard and scope of review to be applied by federal appellate courts in first amendment establishment clause cases.

This case involves a determination of whether New Jersey's moment of silence statute, which requires that all principals and teachers in each public school in New Jersey "permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student before the opening exercises of each school day for quiet and private contemplation or introspection," violates the first amendment's prohibition against the enactment of a "law respecting an establishment of religion".

This Court has not previously decided the constitutionality of a permissive and facially neutral moment of silence statute. Recently, in *Wallace* v. *Jaffree, supra,* while six members of this Court appear to have strongly suggested that a "straight forward" moment of silence statute would pass muster under the first amendment, that issue was not then before the Court for decision. The New Jersey MOS statute places that issue squarely before this Court for decision.

Moreover, unless corrected, the majority opinion of the Third Circuit Court of Appeals will serve only to confuse and obfuscate a proper understanding and implementation of the Supreme Court's decisions in this sensitive area of first amendment jurisprudence.

While the court of appeals panel was unanimous on a number of issues, it sharply divided over the proper meaning and application of this Court's establishment clause "purpose" inquiry—an issue that has rarely been addressed or determinative in this Court's resolution of an establishment clause controversy. Thus, the entire panel agreed that the trial court had misinterpreted the MOS as mandating student particiption in a moment of silence. As reinterpreted by the panel, the language of the MOS was "permissive only" as to student participation. (App. A 15a, 31a). After review by the panel, the trial court's analysis under "entanglement" was rejected as "not persuasive" (App. A 16a-17a; 31a) and contrary to the Supreme Court's recent pronouncements in *Lynch* v. *Donnelly,* 465 U.S. 668 (1984) and *Mueller* v. *Allen,* 463 U.S. 388 (1983). Finally, the panel agreed that even if the MOS was viewed as an accommodation to religion, the district court's "effect" analysis was "flawed". (App. A 18a; 31a).

Ultimately, however, the panel disagreed over the narrow issue of the validity of the district court's conclusion that the MOS lacked a secular purpose. The majority concluded that even though it would not sustain a finding that the statute's purpose was to encourage prayer over other alternatives (App. A 29a), it was constrained to "accept" the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day." (App. A 27a-28a).

According to the majority, the issue it faced had not been answered by the Supreme Court in *Wallace* v. *Jaffree, supra,* but instead was guided by the Supreme Court's more recent decision in *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914, 2917 (1985).

> "Accordingly, because the Supreme Court has expressly required a secular purpose, when considering a constitutional challenge under the establishment clause and because the district court made a finding that N.J.S.A. 18A:36-4 lacked such a secular purpose, we hold the New Jersey statute to be unconstitutional under the first amendment."

(App. A 29a-30a).

In his dissent, Judge Becker carefully outlined a purpose analysis which had no common features with either the majority or the district court's approach. Applying that analysis, Judge Becker detailed why the trial court's finding that the MOS lacked a secular purpose was "unsupportable" under either a plenary review, as mandated by the Supreme Court's decision in *Bose Corp.* v. *Consumer Union,* 466 U.S. 485 (1984), or under a more deferential review, as had been implemented by the majority under Fed. R. Civ. P. 52(a). (App. A 44a-60a).

As will be discussed further herein, the panel majority's opinion warrants review by this Court for essentially two interdependent reasons. First, the narrow acceptance by the majority of the trial court's finding of no secular purpose incorporates (albeit in some respects *sub silentio*) a ratification of a host of substantial and fundamental errors in understanding and implementing a plethora of Supreme Court decisions which, if not corrected, will unnecessarily complicate and confuse other federal courts in the resolution of establishment clause controversies. Thus, for example, the Third Circuit majority opinion, in affirming the district court's conclusion, ratifies the trial court's unexplained rejection of a number of this Court's decisions validating the concept of a "plausible secular purpose";

sanctions the trial court's errant inquiry into subjective legislator motivation; validates the trial court's rejection of fundamental presumptions and rules of statutory construction; endorses the trial court's acceptance of and reliance on wholly inadmissible hearsay; and approves the trial court's utilization of constitutionally irrelvant evidence to second-guess the wisdom of the New Jersey Legislature in enacting the MOS.

Secondly, the panel majority's unexplained application of the "clearly erroneous" standard of review is in clear conflict with this Court's recent guidance in *Bose Corp.* v. *Consumers Union,* 466 U.S. 485 (1984); is in conflict with a number of other federal appellate decisions; and is logically inconsistent with its own conclusions as to the insufficiency of the trial court's conclusions under the "effect" and "entanglement" prongs of this Court's establishment clause test. The inexplicable application of the wrong standard of review was error compounded by a misapplication of even that standard, and unless corrected will serve to foster additional errors in the understanding and application of not only this Court's decision in *Bose,* but the traditional standard of review provided by Fed. R. Civ. P. 52(a).

I. The decision of the court of appeals, holding New Jersey's Moment of Silence Law unconstitutional based upon a finding that the legislative purpose in enacting the law was religious, was predicated upon an erroneous interpretation and application of the purpose prong of the Supreme Court's tripartite establishment clause test.

(a) The constitutional standard: the three-part test.

In analyzing the MOS under the establishment clause, the courts below purported to be guided by the three-part test set forth by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, this Court stated:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion'."

Id. at 612-613.

To withstand attack under the establishment clause, the challenged state action must satisfy each of the three criteria. The court of appeals had no difficulty in reversing the district court's conclusions that the MOS failed both the "effect" and "entanglement" prongs of the *Lemon* test. (App. A 16a-22a; 31a).

In analyzing the MOS under the purpose prong of *Lemon*, while traveling different routes, both the majority of the court of appeals and the district court fundamentally erred in interpreting and applying this Court's "purpose" requirement and as a result incorrectly declared the MOS unconstitutional. The panel majority utterly failed to engage in any meaningful analysis of this Court's prior

opinions addressing "purpose", and instead ultimately abdicated its responsibility by accepting without question "the trial court's finding that the legislative purpose in enacting N.J.S.A. 18A:36-4 was religious". (App. A 27a). Curiously, the majority did not in any way question the accuracy of Judge Becker's observation in his dissent, that "[t]he evidence simply does not demonstrate that the statute lacks any secular purpose." (App. A 59a). Judge Becker's analysis of "purpose" was very different from that of the majority and is, it is submitted, consistent with and faithful to this Court's prior instructions concerning the proper meaning and application of the purpose prong.

(b) The ruling as to purpose.

As pointed out above, the court of appeals decision validating the district court's factual finding of no secular purpose incorporates a number of significant errors made by the district court in arriving at that conclusion. In conducting its purpose examination, the district court purported to peer behind the face of the MOS in order to reject (1) the explicity neutral language of the statute and (2) the plausible secular purpose that was both evident from the face of the statute and confirmed by the proofs presented by the Legislature.

In so doing, the district court announced new criteria not heretofore recognized by this Court, including a requirement that a State enactment challenged under the establishment clause have an "overwhelmingly obvious and important secular purpose". (App. B 91a). On the basis of its conclusion that the MOS had "no overwhelming secular purpose" (App. B 91a), the district court engaged in a wholly unprecedented judicial search for legislative purpose in which it entertained evidence relating to the wisdom and necessity of the MOS (App. B 82a-85a); made

assumptions outside the record concerning the history of school prayer in New Jersey (App. B 86a-87a) and New Jersey demographics (App. B 80a; 85a); permitted the introduction of legislation considered by prior independent legislatures (App. B 86a-87a; 91a-92a); received the selected hearsay utterances of a handful of legislators who spoke during (and outside) legislative committee meetings and floor debates leading to the enactment of the MOS (App. B 86a-87a; 92a); and imposed a new requirement that in order for the court to accept the plausible secular purpose identified by the Legislature at trial, that purpose must be shown to have been specifically and explicitly discussed and considered by the Legislature when it enacted the MOS. (App. B 83a; 87a-88a). In short, the district court imposed on the Legislature, in effect, a duty to establish the "actual subjective intent"— or perhaps more accurately, the "collective subjective motive"— of the legislators who enacted the MOS.

While the district court paid lip service to the Legislature's position that "constitutional analysis of legislative purpose does not involve a judicial inquiry into supposed illicit legislative motive" (App. B 91a), it nonetheless engaged in a wholly unprecedented inquiry into the alleged subjective motivation of some legislators in enacting the MOS and concluded from incomplete and highly incompetent fragments of "evidence" that the "history of this kind of legislation and the circumstances of the adoption of this particular bill point inescapably to an essentially religious purpose." (App. B 91a-92a). To reach this bald conclusion, the court relied not only on the fragmentary hearsay utterances of a handful of legislators,[4] but consider-

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[4] The New Jersey Legislature consists of two houses: an Assembly which has a membership of 80 Assembly persons and a Senate

(Footnote continued on following page)

ed without any rational explanation as to their relevancy, items of legislation that had been introduced during sessions of prior independent legislatures. (App. B 86a).

An examination of the district court's legal analysis reveals that the court had absolutely no precedental support for its unique procedure. Indeed, the only justification offered was a labored attempt to distinguish the case before it from the controlling principles enunciated by the Supreme Court in *United States* v. *O'Brien,* 391 U.S. 367 (1968). That distinction between "the motives and purposes of individual legislators and an institutional legislative purpose" (App. B 91a) was used by the district court as justification for its departure from the clear admonitions announced in *O'Brien.* As construed by the district court, *O'Brien* stood for the proposition that it was only where a statute on its face contained an "overwhelmingly obvious and important secular purpose" (App. B 91a) that a court was prohibited from exploring subjective legislative motivations. In this regard, the district court was plainly wrong.[5]

(Footnote continued from preceding page)

which has a membership of 40 Senators. During the legislative process, the MOS was voted upon by as many as 74 Assembly persons and 35 Senators. All tolled, the plaintiffs presented fragments of statements from 5 Assembly persons and 11 Senators not all of whom even reportedly stated anything relevant.

[5] The analytical basis employed by the district court in applying its distinction is entirely circular. That is, the court reviewed and relied upon the individual "motive evidence" in order to conclude that the MOS lacked an "overwhelmingly obvious and important secular purpose" which in turn permitted it to escape the evidential limitations of *O'Brien.* Thus, it used the legally improper "evidence" in order to reach a legal/factual conclusion that it could consider the self same "evidence". Moreover, purporting to draw a distinction between "motives and purposes of individual legislators"

(Footnote continued on following page)

No such distinction was recognized by *O'Brien* nor has it been recognized by any court which the district court could identify.[6] Indeed, there is no such distinction.

The district court's misreading of *O'Brien* was carried forward and compounded by the majority opinion of the court of appeals. In the process, the clear instruction of the Supreme Court's decision in *O'Brien* was further confused and drained of meaning. As read by the majority, *O'Brien* authorized the use of legislator statements (apparently from whatever source derived) whenever the court was required to determine legislative purpose. (App. A 27a, n.9). In arriving at this conclusion, the panel opinion misquotes the *O'Brien* opinion and, as pointed out by Judge Becker (App. A 50a, n.9), misreads the clear limitations identified in *O'Brien*. The uniquely limited circumstance in which the *O'Brien* court would sanction such an inquiry has no application whatsoever to an establishment clause controversy. *Cf. Washington* v. *Davis,* 426 U.S. 229, 244 n.11 (1976); *Lynch* v. *Donnelly,* 465 U.S. 668 (1984). And even where such an inquiry is authorized, there is absolutely no indication that it would authorize the use of the types of utterly unreliable hearsay that the district court considered.

Starting as early as the decision in *Fletcher* v. *Peck,* 10 U.S. 87 (1810), wherein the Supreme Court refused to

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(Footnote continued from preceding page)

and "institutional legislative purpose," it then used the former to prove the latter, thereby obliterating the putative distinction.

[6] The Supreme Court in *O'Brien* specifically rejected a similar argument that had been advanced on the basis of two of its earlier decisions, *Grosjean* v. *American Press,* 297 U.S. 233 (1936) and *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). See *United States* v. *O'Brien,* 391 U.S. at 384-385.

void the Georgia legislature's sale of lands on the theory that its members were corrupted by impure motives in passing the legislation, it has always been well-settled that judicial inquiry into subjective legislator motives represents an improper intrusion into the affairs of another branch of government which the court will not undertake. In *McCray* v. *United States,* 195 U.S. 27, 56 (1904), the Supreme Court noted that "the decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Accord Arizona* v. *California,* 283 U.S. 423, 455 (1931) (in which Justice Brandeis cites a long list of cases holding that the courts may not inquire into the motives that induce legislative bodies to enact laws). The district court's procedure, as ratified by the court of appeals majority, is exactly the type of impermissible inquiry this Court clearly rejected in *O'Brien*:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We

> decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 383-384. *Accord Palmer* v. *Thompson,* 403 U.S. 217, 224-225 (1971).

The procedure adopted by the district court is totally inconsistent with Supreme Court pronouncements as to the judiciary's proper scope of review in determining the constitutionality of state legislation.[7] As Justice Black noted in *Palmer* v. *Thompson, supra,* there is an element of futility in an approach which would invalidate a law on the basis of the illicit subjective motivations of its supporters. "If, the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governmental body repassed it for different reasons." *Id.* at 255.

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[7] The *O'Brien* analysis is particularly applicable to the district court's reliance upon prior legislative proposals (spanning 10 years) as constituting proof of an illicit subjective legislative motivation for the MOS. (See App. B 86a). First, the district court failed to provide any rational way to determine how the acts of prior legislators and independent legislative bodies indelibly mark the subsequent activities of an independent legislative body. Secondly, even assuming arguendo that there were certain supporters of the prior legislation who also voted for the MOS, the district court failed to explain how it could determine that such legislators' subjective motives had remained stagnant. And finally, as made clear by *O'Brien*, even assuming arguendo that the prior legislators who had supported the earlier legislation had maintained their subjective views (and that those views were clear), the district court failed to explain how those views could be imputed to the multitude of other legislators who voted for the MOS.

The district court's procedure in the instant case was completely contrary to all of the guidance that has been supplied by the Supreme Court and was clearly in error.

In affirming the district court's purpose finding, the court of appeals majority, *sub silentio,* endorsed the trial court's unprecedented purpose analysis. In so doing, the majority totally ignored this Court's teaching in *Mueller* v. *Allen,* 463 U.S. 388, 394-395 (1983) that the judiciary should be reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute".

Moreover, in ratifying the district court's search to find religious purpose—as opposed to accepting a clearly plausible secular purpose—the majority completely ignored expressions from members of this Court which support the proposition that a facially neutral moment of silence statute presumptively has a secular purpose. See *School District of Abington Township* v. *Schempp,* 374 U.S. 201, 281 (1963) (Brennan, J., concurring) (wherein Justice Brennan noted that "the observance of a moment of reverent silence at the opening of class [may serve] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government."); see also *Wallace* v. *Jaffree,* 105 S. Ct. 2491 (opinion of Stevens, J.); at 2493 (Powell, J., concurring); at 2498-2499 (O'Connor, J., concurring).[8]

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[8] Many constitutional scholars have argued that moments of silence may be constitutional. See L. Tribe, *American Constitutional Law* §14-6 at 829 (1978); P. Freund, *Religion and the Pubilc Schools*: The Legal Issue, at 23 (1965); J. Choper, *Religion in the Public Schools; A Proposed Constitutional Standard,* 47 Minn. L. Rev. 329, 371 (1963); P. Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich. L. Rev. 1031, 1041 (1963).

Although the majority opinion acknowledges, as it must after *Jaffree,* that "in the abstract" the Supreme Court would uphold a statute such as the moment of silence, ultimately it concludes that the expressions of the various Justices in *Jaffree* do not provide a clear answer for the case before it. Instead, by accepting the district court's finding of no secular purpose and by ignoring the clear guidance of this Court as to the acceptability of a "plausible" secular purpose to satisfy the "purpose" inquiry, the majority ironically concludes that its decision must be guided by *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914 (1985) (a case decided principally under the effect prong) and invalidates the MOS as unconstitutional.[9]

Thus, despite its conclusion that the MOS is a neutrally worded statute which is facially and operationally constitutional (and could not be found to endorse prayer), the court of appeals nonetheless found that the MOS violated the establishment clause by embracing the district court's finding that the law lacked a secular purpose. In so ruling, the court of appeals sanctioned not only the trial court's unjustified rejection of Supreme Court decisions endorsing the validity of a "plausible" secular purpose, but more importantly, approved the district court's unprecedented search for subjective legislator motive as an answer to the Supreme Court's "purpose" test. In the end, both the court of appeals and the district court transmogrified this Court's "secular purpose" standard into "a subjective legislator motive" test—a test and standard that has never been recognized or announced

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[9] In the process, the majority fail to mention, much less address, how it escapes the application of the presumption of constitutionality identified by Judge Becker in his dissent. (App. A 38a).

by this Court.[10] *See McGowan* v. *Maryland,* 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring).

(c) The proper purpose analysis.

As pointed out by Justice Rehnquist, the *Lemon* test's "secular purpose prong has proven mercurial in application because it has never been fully defined" nor has this Court "ever fully stated how the test is to operate". *Wallace* v. *Jaffree,* 105 S. Ct. 2479, 2517 (1985) (Rehnquist, J., dissenting). Despite this shortcoming, Justice Powell has observed that the *Lemon* standard itself is the "only coherent test a majority of this Court has ever adopted" in analyzing an establishment clause case. *Id.* at 2494 (Powell, J., concurring). Indeed, in only two cases since the enunciation of the tripartite test, in *Larson* v. *Valente,* 456 U.S. 228 (1982) and *Marsh* v. *Chambers,* 463 U.S. 783 (1983), has the Supreme Court resolved an establishment clause issue without applying the *Lemon* test.

In reviewing this Court's establishment clause decisions, one thing is clear: the Court's purpose inquiry will start with the statute itself. In fact, the decisions of this Court reflect that generally the Court's examination of purpose has not strayed from the face of the enactment. *See, e.g., Committee For Public Education* v. *Nyquist,*

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[10] As a result of its reinterpretation of the MOS as a permissive statute, the panel majority devotes considerable time to the discussion of the concept of "accommodation." (App. A 9a-15a). Ultimately, however, the majority recognizes that this characterization does not resolve the constitutional issue (App. A 15a) and in the end the discussion of accommodation is essentially irrelevant to its determination under the purpose prong. It is beyond dispute, however, that if, as urged by the Legislature, the majority is wrong as to purpose, than its "effect" and "entanglement" analyses are nonetheless valid for a statute with a secular purpose as for one viewed as an accommodation.

413 U.S. 756, 773 (1973) ("we need touch only briefly on the requirement of a secular purpose. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests."); *Sloan* v. *Lemon,* 413 *U.*S. 825, 829-830 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602, 613 (1971).

Where an enactment does not contain an explicit statement as to its particular secular purpose, the Supreme Court has not hesitated to infer a "plausible" secular purpose. In *Mueller* v. *Allen,* 463 U.S. 388, (1983) this Court stated:

> "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

Id. at 394-395.

In *Lynch* v. *Donnelly,* 465 U.S. 668 (1984), Chief Justice Burger noted that "[t]he court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Id.* at 680.

Similarly, in *Wallace* v. *Jaffree,* 105 S. Ct. 2479 (1985) Justice Powell observed that only after a court is "unable to discern an arguably valid secular purpose" would the Court be required "by our precedents to hold that the statute fails the first prong of the *Lemon* test". *Id.* at 2495 (Powell, J., concurring).

While a statute must satisfy each prong of the three prong test, the purpose prong has rarely been determi-

native of the inquiry, since it may be satisfied by a plausible secular purpose. Most recently, in *Wallace* v. *Jaffree, supra,* (statute permitting public school teachers to observe a one minute period of silence to be used by students for meditation *or voluntary prayer*) this Court held, after distinguishing the Alabama statute under review from an earlier Alabama law—the text of which is not significantly different from New Jersey's moment of silence law—that the later law was unconstitutional because a plausible secular purpose could not be discerned from its face nor was any non-religious reason for the statute's enactment offered or identified. In *Stone* v. *Graham,* 449 U.S. 39, 42 (1980) (statute requiring posting of ten commandments), this Court rejected a statement of secular purpose placed on the face of the statute because of the *inevitable* religious effect of posting such an "undeniably sacred text". In *Stone,* the Court did not peer behind the statute, but instead held that the use of an undeniably religious symbol served to define the "purpose" of the statute as a matter of law—subjective intent to the contrary notwithstanding.[11] Finally, in *Epperson* v. *Arkansas,* 393 U.S. 97, 107 (1968) (statute enacted by popular referendum barring the teaching of evolution), this Court invalidated the statute because no discernable secular pur-

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[11] While the purpose prong was not expressly discussed in this Court's recent decision in *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914 (1985), both the clear language of the statute, as well as the inevitable operative effect (favoring Sabbath observers), support the foregoing view. Thus through the use of its "effect" test, the Court has been able to resolve the issue without search for subjective legislator motivation. Indeed, in *Jaffree,* Justice O'Connor expressly suggested that where reliable legislative materials are not available to call a close case, the inquiry under the "effect" prong should serve to decide those cases where the validity of an expressed secular purpose is in doubt. *Wallace* v. *Jaffree,* 105 S. Ct. at 2500 (1985).

pose could be inferred—and none was suggested "other than the religious views of the [the state's] . . . citizens".

In none of this Court's decisions has the Court attempted to intrude into the area of subjective legislator motive when faced with a facially neutral unambiguous statute. The decisions of this Court demanded that judicial inquiry into the purpose of a legislature in enacting a law be limited. *See Everson* v. *Board of Education,* 330 U.S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose); *McGowan* v. *Maryland,* 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring). In *Jaffree,* Justice O'Connor commented on the scope of judicial review into legislative purpose: "If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 2500 (O'Connor, J., concurring). Also in *Jaffree,* Chief Justice Burger observed this Court's long established precedent of "determining legislative purpose from the face of a statute as a whole." *Id.* at 2506 (Burger, C.J., dissenting).

Here, the district court and the majority of the court of appeals simply chose to ignore all of this Court's teachings pertaining to the limited scope of an examination for legislative purpose. More importantly, their collective decisions reveal a fundamental lack of understanding of this Court's "purpose" inquiry in a constitutional setting. No attempt was made to determine the legislative purpose from the face of the neutral statute nor was any deference accorded to the "plausible" secular purpose identified and advanced by the Legislature. Instead, the district court veered in another direction under a new and unsanctioned

standard which it viewed as permitting it to rely on irrelevant evidence concerning the lack of wisdom, necessity and efficacy of the MOS; enabling it to patch together illogical inferences on the basis of other attempts by earlier independent New Jersey legislatures to return prayer to the public schools; and most disturbingly, permitting it to entertain the introduction of a hodgepodge of inadmissible hearsay comments from a handful of legislators in order to arrive at its conclusion that the MOS lacked an "overwhelmingly secular purpose." When analyzed under the principles recited above, it is manifest that both the district court and the majority of the court of appeals erred not only in understanding the proper scope of the purpose inquiry, but also erred in misapplying a number of fundamental decisions of this Court guiding inquiry in an establishment clause challenge.

II. The court of appeals erred in applying a "clearly erroneous" standard of review to this first amendment establishment clause controversy.

The court of appeals majority employed a clearly erroneous standard of review, and, therefore, let stand the district court's putatively factual determination that the New Jersey Legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious. Notwithstanding the fact that such a finding: (1) involves the ultimate constitutional fact which goes to the heart of the purpose prong of the *Lemon* test; (2) at the very least, involves a mixed question of fact and law; and (3) directly implicates the constitutional claims of the parties, the majority chose to limit its review of the record below, under Fed. R. Civ. P. 52(a).

The most recent pronouncement of this Court as to the standard of review in cases involving substantial consti-

tutional rights is *Bose Corp* v. *Consumers Union,* 466 U.S. 485 (1984). In *Bose,* this Court held that an appellate court is required to independently review the entire trial court record in order to preserve the liberties established by the United States Constitution. The *Bose* court exercised plenary review of a lower court's finding of actual malice in a libel case. As the dissent below points out, a determination of whether a speaker had "actual malice" is, in a constitutional sense, identical to determination of whether a legislature had a secular purpose; both are important "constitutional facts" which presuppose a legal standard and have potentially grave effects on first amendment rights.

The determination of whether a statute has a secular purpose goes to the very heart of the matter. It involves not only an analysis of the facts presented but also a complete understanding and appreciation for the first amendment rights directly and inextricably implicated. The "facts" alone cannot be reviewed in a vacuum—by the trial court or by the appellate court. Their constitutional significance is manifest.

The standard of review employed by the court of appeals majority is contrary to decisions of this Court, decisions of the Third Circuit in other cases, as well as the decisions of other courts of appeals. In *Bob Jones University* v. *United Sta'es,* 461 U.S. 574 (1983), this Court reviewed the lower court's finding of an institution's purpose as primarily educational or religious under a plenary standard of review. In *Presbyterian & Reformed Publishing Co.* v. *Commisioner of Internal Revenue,* 743 F.2d 148 (3d Cir. 1984), the Third Circuit, following *Bob Jones,* held that the Tax Court's determination of purpose was subject to plenary review.

Similarly, in *Bender* v. *Williamsport Area School District,* 741 F.2d 538 (3d Cir. 1984), *cert. granted,* 105 S. Ct. 1167 (1985) the Third Circuit acknowledged that when presented with "constitutional facts", an appellate court is free to draw its own inferences from the record. 741 F.2d at 542. Significantly, and in sharp contrast to the panel which decided this matter, the Third Circuit in *Bender* recognized that independent appellate review was appropriate in cases involving constitutional and, in particular, first amendment rights.

Other courts of appeals have also refused to be bound by the clearly erroneous standard set forth in Fed. R. Civ. P. 52(a) when presented with first amendment issues. In *Brasslett* v. *Cota,* 761 F.2d 827 (1st Cir. 1985), the plaintiff, a public employee, claimed that he was discharged in violation of his first amendment rights for remarks he made during a television interview. Noting that *Bose* reaffirmed the rule of independent appellate review historically applied in first amendment cases, the First Circuit undertook an independent review of the district court's finding that plaintiff's statements to the press were unprotected under the first amendment. *Accord McMullen* v. *Carson,* 754 F.2d 936 (11th Cir. 1985). *See also United States* v. *Merrill,* 746 F.2d 458, 463-464 (9th Cir. 1984) (different levels of appellate review in obscenity case for each prong of the test set forth in *Miller* v. *California,* 413 U.S. 15 (1973)); *Lebron* v. *Washington Metro Area Transit Authority,* 749 F.2d 893 (D.C. Cir. 1984) (where plaintiff claimed violation of first and fourteenth amendment rights when defendant refused to allow him to display his poster which criticized the Reagan administration; the court independently examined the whole record, following *Bose*).

Although some courts purport to limit *Bose* to defamation matters (or even further)[12] it must be emphasized that *Bose* was a reaffirmation of the well established principle that questions of constitutional fact compel an appellate court's *de novo* review of the record. As the *Bose* court explained:

> This Court "has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so, 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'"

80 L. Ed. 2d at 522 n.27, quoting *Jacabellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.).[13]

As urged by Judge Becker in his dissent, there is no logical reason why in this critical area of constitutional

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[12] *See Bartimo* v. *Horsemen's Benevolent and Protective Ass'n* 771 F.2d 894, 896-897 (5th Cir. 1985); *Tavoulareas* v. *Piro, Inc.*, 759 F.2d 90, 97 (D.C. Cir. 1985); *Levine* v. *CMP Publications*, Inc., 753 F.2d 1341 (5th Cir. 1985) (en banc) (Rubin, J., dissenting); *cf. Olivieri* v. *Ward*, 766 F.2d 690 (2d Cir. 1985) (Kearse, J., dissenting).

In *Renton* v. *Playtime Theaters, Inc.*, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986) the Ninth Circuit followed *Bose* and refused to apply a clearly erroneous standard to the district court's findings on the factors set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968) to determine the constitutionality of a government regulation affecting speech. This Court did not reach the issue because it found that under any standard of review the district court's findings should not have been disturbed. 54 U.S.L.W. at 4163 n.3.

[13] More recently, in *Miller* v. *Fenton*, 106 S. Ct. 445, 452 (1985), this Court refused to "abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal

(Footnote continued on following page)

concern plenary review should not be undertaken. (App. A 44a-47a). Indeed, in this Court's more recent establishment clause opinions, it is clear that the Court, albeit *sub silentio,* has implemented a plenary review standard. See, *e.g., Lynch* v. *Donnelly,* 465 U.S. 668 (1984); *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914 (1985); *Witters* v. *Washington Dept. of Services for the Blind,* 106 S. Ct. 748 (1986).

The court of appeals panel majority in contradiction to a number of decisions by other federal appellate courts (including decisions by other panels of its own court) implemented the wrong standard of review which, as the dissent persuasively points out, it then misapplied in the instant case. (App. A 27a; 58a-60a). In so doing, the majority purported to escape its responsibility to correct the fundamental errors that permeated the district court's implementation of this Court's "purpose" test.

CONCLUSION

Based upon the record below, it is respectfully submitted that the district court improperly confused and intermixed the judicially distinct concepts of legislative intendment or "purpose" with individual legislator "motive", leading the court to gather a gallimaufry of fractional "facts" to purport to devine an illicit, though facially unapparent, resolve on the part of the New Jersey Legislature. In doing so, the district court has pieced

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review." The Court reversed the Third Circuit's decision, which had employed the clearly erroneous standard of Rule 52(a). *Miller,* 741 F.2d at 1464 (3d Cir. 1984). It is noteworthy that Judge Gibbons dissented, apparently believing that less deference should be afforded the trial court in voluntary confession cases than in cases implicating first amendment rights.

together, in patchwork fashion, a flimsy matrix of disjointed, and generally inadmissible, "evidence" in order to support a conclusion of "purpose" otherwise suppositious from the legislative backdrop—a manner of inquiry into governmental action often warned against by this Court and surely never sanctioned. Further, the legal standards, as espoused by this Court, were tormented, in procrustean fashion, to fit the "facts." This error was compounded by the court of appeals by way of its peculiar, and plainly ambivalent, refusal to review the significant constitutional issues in plenary fashion, accepting instead the "clearly erroneous" standard not applicable to matters of basic constitutional dimension.

The challenged enactment passes constitutional muster according to the tests articulated by this Court and should be upheld in order to give guidance to the nation's courts and people in this sensitive area of the law.

We respectfully submit that the Court of Appeals for the Third Circuit incorrectly affirmed the judgment of the district court and erroneously declared a state statute unconstitutional. We believe that the questions as presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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March 19, 1986

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK SCHORSKE, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION

Defendants

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate; the NEW JERSEY SENATE,

Defendant Intervenors

New Jersey Council of Churches
New Jersey Education Association

Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate, the New Jersey Senate, Defendant Intervenors,

Appellants

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY - NEWARK

(D. C. Civil No. 83-0089)

Argued October 26, 1984

Reargued August 13, 1985

Before GIBBONS and BECKER, *Circuit Judges* and KATZ, *District Judge**

(Filed December 24, 1985)

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* Hon. Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

This appeal by the New Jersey Senate and Assembly as intervening defendants seeks to overturn a declaratory judgment of the district court that N.J.S.A. 18A:36-4 (West 1984-1985) violates the

establishment clause of the first amendment. The intervening defendants also appeal from a declaratory judgment that plaintiffs are entitled to counsel fees on the authority of 42 U.S.C. § 1988 (1982). The appeal requires that we assess the impact on the district court's ruling of the subsequent decision of the Supreme Court in *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). We affirm the declaratory judgment that the statute is unconstitutional, but dismiss the appeal from the declaratory judgment on fees.

I.

The challenged statute, passed by the New Jersey Legislature over the Governor's veto on December 16, 1983, provides,

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

N.J.S.A. 18A:36-4. Shortly after its passage, on January 10, 1983, several public school pupils, several parents of public school pupils, and one public school teacher filed a verified complaint seeking a declaration that N.J.S.A. 18A:36-4 is unconstitutional, on its face and as applied, and an injunction prohibiting the defendants from implementing it. The named defendants are Saul Cooperman, Commissioner of New Jersey's Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education. Cooperman was joined because he allegedly is charged with implementing, enforcing, and promulgating N.J.S.A. 18A:36-4. *See* N.J.S.A. 18A:4-23 (West 1968) ("The Commissioner

shall have supervision of all schools of the state receiving support or aid from state appropriations. . . ."). The two Boards of Education were joined because the schools operated by them allegedly took steps to implement the statute.

On the day the complaint was filed the district court issued a temporary restraining order enjoining the defendants from enforcing N.J.S.A. 18A:36-4. Thereafter it became known that the New Jersey Attorney General, who under New Jersey law would normally be responsible for defending Commissioner Cooperman, would not defend the constitutionality of the Act. On January 14, 1983 the temporary restraining order was modified so as to direct the Commissioner of Education

> to notify the school districts of the State of New Jersey . . . that this Court has made an initial determination that P.L. 1982, Ch. 205 [N.J.S.A. 18A:36-4] is unconstitutional and that a temporary restraint has been issued restraining any further enforcement of that provision by defendants and that pursuant to the further Order of this Court the local school districts of the State of New Jersey, their officers, agents, servants, and employees and successors are to immediately cease any further enforcement of P.L. 1982, Ch. 205, pending a hearing for a Preliminary Injunction.

Joint Appendix 56-57. By the time the January 14, 1983 order had been entered the court was aware that, while the Attorney General would not defend the legislation, the President of the New Jersey Senate, the Speaker of the New Jersey General Assembly, the Senate, and the General Assembly (legislators) sought to intervene for that purpose. Those applicants for intervention consented to the January 14, 1983 modification of the temporary restraining order,

although it is not clear why they had any authority to consent to an order purporting to bind nonparty school districts. On January 18, 1983 the legislators' motion to intervene was granted. They and the named defendants on the same day consented to the entry of an order enjoining enforcement of N.J.S.A. 18A:36-4 until the further order of the court.

Thereafter the Attorney General filed on behalf of the Commissioner of Education an answer in which he denied that he had implemented, or was charged with the duty of implementing, enforcing, or promulgating N.J.S.A. 18A:36-4. The answer also pleaded that the plaintiffs had not been deprived of any rights, privileges, or immunities secured to them by the United States or the New Jersey Constitutions. Thus the Attorney General's answer appears to put in issue the question whether the Commissioner is an appropriate defendant and also the question whether N.J.S.A. 18A:36-4 is unconstitutional. The Attorney General did not, however, take any further steps in defense of the merits of the complaint.

The School District of Old Bridge Township also filed an answer, in which it admitted instituting, pursuant to N.J.S.A. 18A:36-4, the practice of observing a moment of silence. Edison Township School District apparently defaulted. Neither it nor Old Bridge Township School District took any further active role in the litigation.

The answer of the intervening legislators, in contrast with that of the Commissioner of Education, admitted that the Commissioner was charged with the duty of implementing, enforcing, and promulgating N.J.S.A. 18A:36-4. The legislators also defended the constitutionality of the legislation through final hearing, which commenced on September 15, 1983. Prior to the final hearing the district court resolved several disputes over discovery, to which further reference is made below.

Appendix A

The district court made findings of fact and conclusions of law in support of a final judgment, dated November 10, 1983 "that New Jersey P.L. 1982, Ch. 205 is unconstitutional on its face and as applied, and that judgment is granted in favor of the plaintiffs herein." Joint Appendix 272. The final judgment contains no injunction. The preliminary injunction presumably terminated upon the entry of the final judgment. Thus we review only a declaratory judgment.

When the declaratory judgment was entered the district court ruled initially that the plaintiffs were not entitled to attorney's fees and costs pursuant to 42 U.S.C. § 1988 (1982). *See May v. Cooperman*, 572 F. Supp. 1561, 1576 (D.N.J. 1983). Thereafter plaintiffs moved for reconsideration of their fee application. On January 26, 1984 the court ordered that the November 10, 1983 order be amended to award counsel fees and costs as against the legislators intervenors only. Joint Appendix 299. The January 26 order directed plaintiffs' counsel to submit an affidavit of services and costs. *Id.* The intervening legislators filed a notice of appeal from the January 26, 1984 order, seeking a reversal both of the declaratory judgment that N.J.S.A. 18A:36-4 is unconstitutional and of the declaratory judgment that the plaintiffs are entitled to a fee award. At the time of the notice of appeal, however, the district court had not determined the amount of fees and costs to be awarded.[1]

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1. The amount was subsequently fixed on March 28, 1984. *See* May v. Cooperman, 582 F. Supp. 1458 (D.N.J. 1984). As this award was fixed after the notice of appeal had been filed, the issue of the fee award is not properly presented for our review. *See* West v. Keve, 721 F.2d 91, 94-97 (3d Cir. 1983). The final declaratory judgment on the merits is nevertheless reviewable at this time. *See* Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 286 n.2 (3d Cir. 1983); West v. Keve, 721 F.2d 91, 93 (3d Cir. 1983); Kane Gas Light & Heating Co. v. International Bhd. of Teamsters, 687 F.2d 673, 677 n.5 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983).

Appendix A

II.

Because N.J.S.A. 18A:36-4 became law shortly before the public schools of New Jersey recessed for the traditional Christmas holiday, and because its implementation was enjoined pendente lite shortly after that recess ended, there was little available evidence of the actual operation of the Act. The Commissioner of Education took no steps to construe it or in any way to implement it. The two named defendant school districts took certain steps to implement the Act, some of which are discussed hereafter, but neither the New Jersey Department of Education nor the New Jersey courts have addressed the question whether the steps taken by those school districts are consistent with the Act. The Act contains no enforcement mechanism of its own. It may fall within the purview of N.J.S.A. 18A:6-9 (West 1968), which provides, "The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws . . . ." So far as the record discloses, no controversies or disputes over this Act have been presented to the Commissioner.[2]

The arid circumstances in which the case was litigated is of some significance because of the rather ambiguous statutory language, which provides,

> Principals and teachers . . . shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student . . . for quiet and private contemplation or introspection. . . .

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2. No party has urged that exhaustion of the remedies available under N.J.S.A. 18A:6-9 is a precondition to relief under 42 U.S.C. § 1983 (1982). *See* New Jersey Education Ass'n v. Burke, 579 F.2d 764, 779 n. 24 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978) (exhaustion of remedies before Commissioner of Education not a precondition to section 1983 relief).

N.J.S.A. 18A:36-4. If the Act said "shall not permit students to observe a period of silence," its meaning would be straight forward, and we would probably be discussing a free exercise claim rather than an establishment claim.[3] If the Act said "shall require students to observe a period of silence," its meaning would be equally straightforward, and the focus of the free exercise claim commensurately narrower. The "shall permit" language on its face does not inform us what role the legislature intended for principals and teachers. One possible interpretation is that the legislature intended to compel teachers to require that all pupils engage in a silent moment. Another is that if some pupils desire to remain silent teachers will require that other pupils accommodate their conduct so as not to disturb the silent ones. A third is that teachers should merely permit those pupils desiring to remain silent for a minute at the beginning of the school day to do so, while other pupils go about their business.

The district court's opinion appears to proceed on the assumption that the Act should be construed in the first manner; that is, that it directs that all pupils be required to engage in a silent moment.[4] Because the

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3. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985).

4. The district court opinion is somewhat ambiguous in this respect. At one point the court opines, "What the minute of silence Bill has done is to mandate that all students assume the posture of one traditional form of prayer." May v. Cooperman, 572 F. Supp. 1561, 1569 (D.N.J. 1983). Elsewhere the court observes,

> It is unclear whether Bill 1064 requires that every student remain present during the minute of silence or whether it simply requires that every student be given an opportunity to observe a minute of silence with the right of those who do not wish to participate to absent themselves.

Id. at 1570.

Attorney General did not participate on behalf of the Commissioner of Education, we have no way of knowing how New Jersey education officials at the state level would construe the statute.

To some extent, the intervenor legislators lent support to the district court's apparent interpretation that the Act means "shall require" rather than "shall permit." Their defense of the Act suggested that it had the secular purpose of providing a calm transition from nonschool life to school work. Obviously, the calm transition explanation would be plausible only if the minute of silence were mandated for all pupils. The district court rejected this posited secular purpose as an after-the-fact rationalization and a pretext. The court nevertheless assumed that the Act mandated a compulsory moment of silence for all pupils.

Our puzzlement over the district court's apparent interpretation of the "shall permit" language is not lessened by a review of previous efforts in New Jersey to deal with the subject of school prayer and moments of silence. Plainly the legislators most interested in the two subjects were quite aware of the difference between a statute requiring student participation in a moment of silence and one merely permitting students desiring to do so to observe such a moment. In 1968, 1969, and 1970 the legislature passed bills that, in contrast with N.J.S.A. 18A:36-4, provided,

> In each public school classroom, the teacher in charge may, or if so authorized or directed by the board of education by which he is employed, *shall*, at the opening of the school upon every school day, *conduct a brief period of silent* prayer or meditation *with the participation of all pupils* therein assembled.

A. 640 (1968)(emphasis supplied); A. 146 (1969); A. 597 (1970). Each of these enactments was vetoed by

Appendix A

Governors Hughes and Cahill, who were in office at the respective times of enactment. Governor William Cahill in his veto message returning Assembly Bill No. 597 to the legislature observed, "Insofar as the bill provides for a brief period of meditation, it is unnecessary since there is presently no provision of law which prohibits individual teachers or school authorities from holding moments of silence in the classroom." Some school districts, the evidence discloses, did in fact hold moments of silence in the classroom before the vetoed bills were passed.[5]

Despite vetoes by two successive governors, a bill identical to that quoted above was pre-filed in the 1972 legislative session. A. 133 (1972). In 1974 a bill was introduced that initially substituted the word "may" for "shall" conduct, which apparently would have made the exercise optional with teachers, but not with pupils. A. 373 (1974). It was amended in committee to restore the word "shall". Assembly Committee Amendments to A. 373. In 1976 a bill identical to that vetoed by Governors Hughes and Cahill was pre-filed. A. 648 (1976). That same year another bill was introduced similar in langauge to Assembly Bill No. 648, except that it provided that if the local school district authorizes it a teacher "may" rather than "shall" conduct a moment of silence. A. 2159 (1976). Assembly Bill No. 648 was amended in committee to read, "In each public school classroom, the teacher shall at the opening of school upon every school day, conduct a period of silent meditation with the participation of all the pupils therein assembled." Thus as amended, the 1976 version of Assembly Bill No. 648 would have removed any local school board option and made mandatory the participation of all pupils in a

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5. There is in evidence a videotape of the moment of silence observed for many years in the schools of Sayreville, New Jersey.

moment of silence. The statement of the Assembly Education Committee to Assembly Bill No. 648 indicates that the amended version was modeled upon Mass. Gen. Laws Ann., Ch. 71, § 1A (West 1982) which was held to be constitutional in *Gaines v. Anderson*, 421 F. Supp. 337 (D.Mass. 1976)(three judge district court). The *Gaines v. Anderson* court reasoned that when Massachusetts legislature struck the word "prayer" from the bill that became law and substituted the word "meditation," it "demonstrated awareness of the distinction between these two words and an intention to further secular purposes without infringing the values protected by the Establishment Clause." *Id.* at 342. The Massachusetts law is mandatory, and the Assembly Committee's reference to it presumably conveys the intention of accomplishing a mandatory silent moment that would be recognized as having a secular purpose. The legislature's awareness of the distinction between mandatory and permissive legislation on the subject in issue is confirmed by the Report of the Senate Education Committee on Assembly Bill No. 648 and Senate Bill No. 3042. The report notes, "Assembly Bill No. 648 is a modification of proposals introduced in previous sessions and requires rather than permits a brief period of silent meditation. Senate Bill No. 3024 would make it optional with the local districts." The report refers to similar legislation in Connecticut, Public Act No. 74-367, § 2, Pennsylvania, 24 P.S. § 15-1516.1, and Massachusetts, Mass. Gen. Laws Ann., Ch. 71 § 1A. Bill No. 648 as amended was passed, but vetoed by Governor Byrne.

Bills that would make pupil participation mandatory were introduced in subsequent legislatures. *E.g* A. 1028 (1980) (local option); A.342 (1980) (all school districts); A.2197 (1981) (local option; amended by Senate to require moment of

silence in all school districts. Assembly Bill 2197 was passed but it, too, was vetoed).

After 1976 the moment of silence bills all omitted specific reference to prayer. The Bill that became law in 1982 also omitted any specific reference to prayer. In Assembly Bill No. 1064, introduced on March 8, 1982, however, the supporters of a moment of silence changed their proposal significantly. The caption and enacting clause read,

> *An Act* to *allow* students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing Chapter 36 of Title 18A of the New Jersey Statutes.
>
> Be it enacted *by the Senate and General Assembly of the State of New Jersey:*
>
> 1. Principals and teachers in each public elementary and secondary school district in this state *shall permit students to observe* a 1 minute period of silence to be used *solely at the discretion of the individual student*, before the opening exercises of each school day for quiet and private contemplation or introspection.
>
> 2. This Act shall take effect immediately.

A. 1064 (1982)(emphasis supplied). This Bill was referred to the Senate and Assembly Education Committees, which filed identical reports as follows:

> Assembly Bill No. 1064 requires all principals and teachers in the public elementary and secondary schools of New Jersey to permit students to observe one minute of silence before the opening exercises of each school day. The bill provides that the one minute of silence is to be used solely at the discretion of the individual student for quiet contemplation or introspection.

Appendix A

A statute similar to that proposed in Assembly Bill No. 1064 was enacted in Massachusetts and has been upheld by the United States District Court of Massachusetts. (Civil Action No. 76-435-M, September 1, 1976).

Statements of Senate and Assembly Education Committees to A. 1064. This Bill is consistent with prior legislative efforts to eliminate the local school district option. It is inconsistent with prior legislative efforts, in that all prior moment of silence proposals mandated the participation of all students.

The New Jersey Legislature does not preserve a transcription of its committee hearings or floor debates. Several witnesses who attended hearings of the Senate or house Education Committee and floor discussion on the Bill testified about what transpired in those proceedings. None of these witnesses referred to anything that took place during the proceedings that would lend support to a reading of the proposed law as mandating student participation.[6] Indeed the only relevant remark to which any witness referred was Marianne Rhode's quotation of Senator Ewing: "Why shouldn't this be allowed? Why not give students the opportunity?" Trial transcript, Sept. 14, 1983, p. 231. There is, so far as we have been able to discover, no other legislative history bearing on the proper interpretation of N.J.S.A. 18A:36-4.

Given the legislature's fairly clear understanding of the difference between legislation mandating a certain action and legislation permitting it, the statement of purpose in Assembly Bill 1064, the wording of the

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6. The witnesses included Joseph Chuman, affiliated with the Society for Ethical Culture, Marianne Rhodes, Associate Director of Government Relations of New Jersey School Board Assocation, and Rev. Dudley E. Sarfaty, Associate General Secretary of the New Jersey Council of Churches.

Education Committee reports on that Bill, and the absence of any legislative history suggesting that the Bill means other than what it says, we conclude that the challenged law is, insofar as student participation is concerned, permissive only.

Although our reading of N.J.S.A. 18A:36-4 is significant in determining the validity of the Act, it does not change the nature of constitutional analysis to be applied. Viewing N.J.S.A. 18A:36-4 as an accommodation statute broadens the issue, but because the state legislators chose to act the statute must still be evaluated as an establishment clause case, and not a free exercise statute. *See Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) (analyzing a state statute that provided private sector employees with the right not to work on their Sabbath under the establishment clause). Thus the issue presented by this appeal is whether a state may direct school principals and teachers to permit pupils desiring to do so to observe a moment of silence at the beginning of the school day.

II.

The Supreme Court has conceded that the principles embodied in the establishment clause of the first amendment have proven difficult to apply. *See Lynch v. Donnelly*, 104 S. Ct. 1355, 1370 (1984) (Brennan, J., dissenting). Faced with this difficult application, the Court has sought guidance by analyzing establishment clause cases under the three-part disjunctive test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon* the Court stated, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.*

at 612-13 (citations omitted). Although this test has been questioned by certain members of the Court, *see Wallace v. Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring), in the Court's most recent establishment clause case, a clear majority endorsed the *Lemon* test as the rubric under which a challenged governmental practice will be judged. *See Wallace v. Jaffree*, 105 S. Ct. at 2489; *see also Lynch v. Donnelly*, 104 S. Ct. at 1362.

The district court, applying the three-part disjunctive test of *Lemon v. Kurtzman*, concluded that the law failed in each respect. According to the district court, the law was enacted for a religious rather than a secular purpose, had the effect both of advancing and of inhibiting religion, and fostered excessive government entanglement with religion. Because we disagree with the district court's analysis in some respects, it is convenient to reverse the usual order of discussion of the *Lemon v. Kurtzman* standards.

A.

Entanglement

Supporting its conclusion that the law would foster an excessive entanglement with religion, the district court reasoned,

> Implementation of the Bill would not involve the State in the kind of continued and pervasive monitoring of sectarian activities which were condemned in *Lemon v. Kurtzman, supra*. It would, however, tend to promote divisiveness among and between religious groups, another form of entanglement. *Gilfallan v. City of Philadelphia* [637 F.2d 924] 932 [(3d Cir. 1980)]. A required moment of silence would pit children and parents who believe in prayer against children and parents who do not.

May v. Cooperman, 572 F. Supp. at 1575.

We do not find this reasoning persuasive. In the first place, as noted in Part I, we are not dealing with a "required" moment of silence, if by "required" is meant an exercise in which all pupils are required to participate. Moreover, the Supreme Court has never held that the potential for political disagreement over government action accommodating religious beliefs is sufficient to trigger the application of the excessive entanglement test. Indeed in *Lynch v. Donnelly* the Court expressly stated "that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct." 104 S.Ct. at 1364. *See also Mueller v. Allen*, 463 U.S. 388, 404 n.11 (1983) (reference to political divisiveness in *Lemon v. Kurtzman* confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools). No doubt any accommodation made by government to the free exercise of religion by believers is politically divisive in the sense that it offends those who believe that such accommodation is an unwarranted toleration. If political divisiviness were the test for entanglement, no governmental accommodation of religion would survive establishment scrutiny. The law is otherwise. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983); *Walz v. Taxi Commission*, 397 U.S. 664 (1970) (tax exemption of Church property does not violate establishment clause).

B.

Primary Effect

Supporting its conclusion that the primary effect of N.J.S.A. 18A:36-4 is to advance and to inhibit religion, the district court reasoned,

> [T]he State has injected itself into religious matters by designating a time and place when children and teachers may pray if they do so in a particular

manner and by mandating conduct by all other children and teachers so that the prayers may proceed uninterrupted in their presence.

While this form of legislation advances the religion of some, it inhibits the religion of others in at least two ways

First, there are those whose religious practices include silent prayer and meditation but who, as an article of faith, believe that the State should have no part in religious matters. For them mandated prayer is no longer prayer . . . . Thus the State, seeking to further religion by mandating certain religious observances, in fact weakens religion by draining vitality from these observances.

. . .

Second, by mandating a minute of silence which permits some persons from engaging in prayer, Bill 1064 prevents other persons from engaging in their kind of prayer . . . . Bill 1064, therefore, mandates an environment which allows some to pray but prevents others from engaging in their form of prayer.

Finally there are those who profess no religion and to whom any form of prayer is offensive. Bill 1064 requires these persons to assume a posture suggestive of particular forms of prayer which are responsive to particular beliefs about ultimate reality.

May v. Cooperman, 572 F. Supp. at 1574-75.

While the district court's analysis of the effects aspect of the *Lemon v. Kurtzman* test presents us with a closer issue than the court's entanglement analysis, we find it flawed as well.

Relying on the testimony of witnesses with theological training, the court found as a fact that "A

short period of group silence at the commencement of the day or at the commencement of an undertaking constitutes one of the traditional forms of prayer of major religious bodies in New Jersey." *Id.* at 1571 (footnote omitted). This finding is not clearly erroneous. Thus for our analysis of the effects issue we will assume that silence is for many pupils the equivalent of prayer. It does not follow, however, that for all pupils that is the case. Moreover, the district court's reasoning seems to be predicated upon an interpretation of the statute as mandating student participation: an interpretation that we have rejected.

The district court's observation that by mandating a minute of silence the legislation "prevents other persons from engaging in their kind of prayer . . ." is a non sequitur. The statute simply does not address the problem of accommodating the beliefs of those whose prayer must be oral or otherwise self expressive. Undoubtedly the school environment requires limitation upon the time, place, and manner of such self expression, even when it is religiously motivated. It is, however, the compulsory school attendance law, not N.J.S.A. 18A:36-4, that "prevents other persons from engaging in their kind of prayer." The challenged statute is a limited exception to the general school regulations, which for educational purposes impose in schools a structured environment in which even religiously-motivated students are required to do the school's thing, and not their own.

That is not to suggest that the practice of observing a moment of silence has no effect upon those pupils who decline to participate in it or those teachers who must permit it. To put the matter in concrete terms, we look at the evidence presented on behalf of Jeffrey May, a plaintiff. May, a high school teacher in the Edison Township school system, and an agnostic, was informed by his school principal that he had to comply with the statute. The principal wrote,

Appendix A

> The interpretation of [N.J.S.A. 18A:36-4] for our school is as follows. We will observe one minute of seated silence in each homeroom at the very beginning of the opening exercises.
>
> You will note that the Bill says students shall be permitted to observe a minute of silence. That will be interpreted to mean that there will be a minute of silence in the classroom so that each student may use that time as the individual interprets his or her desire to do so. This means that there will be no talking and no movement about the room. Each student will remain seated in his or her seat during the one minute period. At the conclusion of the one minute, students will be asked to rise and participate in the Pledge, and the remainder of the homeroom procedure will continue as in the past.

Exhibit C to Complaint. May refused to implement N.J.S.A. 18A:36-4 and was cited for insubordination. Exhibit C to Complaint. Before any administrative proceedings took place on that charge, he filed this action.

The principal's letter demonstrates the manner in which N.J.S.A. 18A:36-4 may impact upon nonbelieving or otherwise objecting teachers and pupils. His reference in the last quoted sentence to the Pledge is to the exercise mandated in New Jersey by N.J.S.A. 18A:36-3(c) (West 1968).[7] That statute

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7. Every Board of Education shall:

. . .

(c) Require the pupils in each school in the district on every school day to salute the United States flag and repeat the following pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all," which salute and pledge of allegiance shall be rendered with the right hand

requires the recitation of a pledge of allegiance to the flag, but excuses from that recitation pupils who have conscientious scruples against it. Such pupils are nevertheless required "to show full respect to the flag while the pledge is being given merely by standing at attention. . . ." In *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978), we considered a challenge to the constitutionality of the pledge statute by a pupil who objected to the requirement that she engage in symbolic speech by standing at attention. We held that the requirement that she stand at attention violated her first amendment rights, but that this requirement was severable from the remainder of the statute. Significantly, however, we did not prohibit the exercise because it had the incidental effect of requiring the objecting pupil to remain in her seat and refrain from interrupting the observance of the exercise by others. So, too, with the minute of silence. Compliance with N.J.S.A. 18A:36-4, by permitting willing students to engage in that observance, has the inevitable effect of requiring that other students refrain from interrupting that exercise. The teacher in charge is also required, as a practical matter, to prevent such interruption. If the moment of silence is to be permitted for some, school discipline must in the meantime be maintained for others. Unquestionably the maintenance of such discipline prevents the others from engaging in their own oral or self-expressive

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over the heart, except that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress.

N.J.S.A. 18A:36-3(c).

conduct. We hold, however, that a restriction of this kind is valid as a legitimate time, place, and manner regulation. *See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S.37, 45-46 (1983); *Heffron v. International Society for Krishna Consciousness Inc.*, 452 U.S. 640, 648-52 (1981); *United States Postal Service v. Council of Greenburgh Civil Assns.*, 435 U.S. 114, 132 (1981). We do not hold that the requirements suggested in the principal's letter, that the pupils in homeroom classes remain seated, is the only possible accommodation to the views of nonparticipants. That would depend, we think, upon the structure of each district's educational program. In some districts it may be possible that nonparticipating pupils leave the classroom during the exercise. But the record in this case is simply too incomplete to adjudicate what time, place, and manner accommodations are required.

The district court's observation that the state has injected itself into religious matters by designating a time and place when children and teachers may pray does not in our view satisfy the effects test. The state equally injects itself into religious matters when it designates a time and place when children and teachers may not pray. As we observed with respect to the effect on persons whose prayer takes more expressive forms, some form of time, place, and manner restraint is necessary for the accomplishment of a school's educational mission. So, too, if accommodation to the preferences of those who wish to pray silently is to be made at all, the state must be free to designate when, during the school day, such accommodation shall take place. We conclude, therefore, that the district court erred in finding that the primary effect of the challenged statute is both to advance and to inhibit religion.

Appendix A

C.

Purpose

The most difficult aspect of the instant case is presented by the legislative purpose feature of the *Lemon v. Kurtzman* formulation. This difficulty is compounded by the Supreme Court's intervening decision in *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). In that case the Court struck down an Alabama statute authorizing a moment of silence at the beginning of each school day because the statute lacked a secular purpose. 105 S. Ct. at 2490. Specifically, the Alabama statute provided,

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which the class is held *may* announce that a period of silence not to exceed one minute in duration *shall* be observed for meditation or *voluntary prayer* and during any such period no other activities shall be engaged in.

Alabama Code § 16-1-20.1 (Supp. 1984)(emphasis supplied). In contrast to N.J.S.A. 18A:36-4, this Alabama statute appears to be optional for teachers, but mandatory for students. It also specifically mentions voluntary prayer. The Supreme Court held that it violated the purpose test of *Lemon v. Kurtzman* because the sole purpose behind its enactment was the endorsement or approval of religion. *Wallace v. Jaffree*, 105 S. Ct. at 2490. In reaching that conclusion the court relied on the testimony of Senator Donald G. Holmes, the prime sponsor of the legislation, that his sole purpose was to reintroduce voluntary prayer in public schools. *Id.* at 2483.

Although the Supreme Court's decision in *Wallace v. Jaffree* was limited to a determination of the

constitutionality of one Alabama statute, in its analysis the Court contrasted and discussed two other Alabama statutes. One of these statutes authorized teachers to lead "willing students" in a designated prayer. Alabama Code § 16-1-20.2 (Supp. 1984). In an earlier opinion the Court had summarily affirmed the judgment of the Court of Appeals for the Eleventh Circuit holding this statute to be unconstitutional. *See Wallace v. Jaffree*, 104 S. Ct. 1704, *aff'g*, 705 F.2d 1526 (11th Cir. 1983).

Another Alabama statute discussed in *Wallace v. Jaffree* provides,

> At the commencement of the first class each day in the first through sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities shall be engaged in.

Alabama Code § 16-1-20 (Supp. 1984). In contrast with N.J.S.A. 18A:36-4, this Alabama statute appears to be mandatory both for teachers and for pupils. Like the New Jersey statute, however, section 16-1-20 omits any specific reference to prayer. The plaintiff in the *Jaffree* case initially challenged the constitutionality of section 16-1-20. At the preliminary injunction stage the district court in Alabama held that it was valid. *Jaffree By ex rel, Jaffree v. James*, 544 F. Supp. 727, 732 (S.D.Ala. 1982). By the time the case reached the Supreme Court the plaintiff had abandoned any claim that section 16-1-20 was unconstitutional. *Wallace v. Jaffree*, 105 S. Ct. at 2481. Thus, technically the Supreme Court did not address the constitutionality of section 16-1-20. In justifying the holding that section 16-1-20.1 was unconstitutional, however, Justice Stevens in the opinion of the Court observed,

Appendix A

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1.
>
> . . .
>
> The Legislature enacted § 16-1-20.1 despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice.

105 S. Ct. at 2491-92 (footnote omitted). Justice O'Connor, concurring, noted that "[b]y mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period." *Id.* at 2499 (O'Connor, J., concurring). Justice Powell, concurring, observed, "I agree fully with Justice O'CONNOR's assertion that some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court's opinion as well." *Id.* at 2493 (Powell, J., concurring) (footnote omitted). Justice White, dissenting stated that

> [I]n my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence

> for meditation or prayer. As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer.

Id. at 2508 (White, J., dissenting). Neither Justice Burger nor Justice Rehnquist, who filed separate dissenting opinions, expressed any disagreement with Justice White's appraisal of the status of moment-of-silence legislation.

It is clear, therefore, that in the abstract a statute such as N.J.S.A. 18A:36-4 would not, in the opinion of the Supreme Court, be deemed invalid under the purpose leg of *Lemon v. Kurtzman*. But unlike *Wallace v. Jaffree* the moment of silence statute is not before us in the abstract. The plaintiffs continue to challenge it. They have made a record in support of that challenge, and the district court has made findings as to the legislative purpose. Thus it seems appropriate to take account of Justice O'Connor's observation that "[t]he face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined." *Id.* at 2499 (O'Connor, J., concurring).

In this case the district court found that the statute, although facially neutral, had a religious and not a secular purpose. The court did not find that teachers had encouraged voluntary prayer over other alternative uses of the minute of silence.[8] The finding

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8. Indeed the district court found.

> The experiences of various schools during the weeks when the minute of silence was enforced suggests that some students will use the minute of silence to pray; some will use it to engage in thoughtful meditation; some will tolerate it though considering it boring and

addressed the purpose of the legislature, not of teachers. In reaching that conclusion the district court relied heavily upon evidence suggesting that the silent minute has no legitimate pedagogical value. The legislators' tendered secular purpose -- to provide a transition from nonschool life to school life -- was rejected as pretextual. *May v. Cooperman*, 572 F. Supp. at 1571. Having rejected the one secular purpose tendered by the intervening defendants, the court noted the history in the New Jersey legislature of other less facially neutral efforts to return prayer to the public schools; in particular the previous activities of one sponsor of the instant legislation.

Because we cannot say that this finding by the district court is clearly erroneous,[9] *see* Fed. R. Civ. P. 52(a), we accept the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious, at least to the extent of requiring school

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> stupid: some who believe it violates their religious convictions will nevertheless submit to it, not wishing to risk public ridicule; some who believe it violates their religious convictions will either refuse to observe it or will absent themselves from the place where others are observing it.

May v. Cooperman, 572 F. Supp. at 1572.

9. The legislators contend that the district court's purpose inquiry is flawed in a number of respects. They object particularly, on hearsay grounds, to the admission in evidence of newspaper accounts of statements made by legislators as to their interest in having religion returned to the school. Plaintiffs urge that these newspaper reports were admissible under the omnibus hearsay exception in Rule 803 (24) because they were more probative in showing legislative purpose than any other evidence they could produce through reasonable efforts. This is true, plaintiffs urge, because of the absence in New Jersey of transcripts of legislative proceedings and the district court's pretrial ruling that individual members of the legislature could not be deposed. This evidentiary issue is a difficult one for several reasons. First, the proponents of

districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day. That, however, is only the beginning of the inquiry. The district court's rejection of the tendered transitional moment secular purpose as pretextual does not compel the conclusion that the state seeks, in Justice O'Connor's words "to encourage voluntary prayer over other alternatives." A purpose of accommodating the religious beliefs of some students is itself a religious purpose, in the sense that absent such beliefs there would have been no reason for the accommodating state action. Given the language of the New Jersey statute which, unlike section 16-1-20 of the

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the evidence have made no showing that nonlegislator witnesses present during legislative sessions were unavailable. Second, the district court's recognition of a legislative privilege not to testify in a case in which legislative purpose is an issue may itself have been an error. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court noted that "[w]hen the issue is simply the interpretation of legislation the Court will look to legislators for guidance as to the purpose of the legislation . . . ." *Id.* at 383. However, the Court went on to say that such an inquiry was limited to a "well-defined class of cases where the nature of the constitutional question requires an inquiry into legislative purpose." *Id.* at 303 n.30. This is such a case. One may question whether the requirements of Rule 803(24) can be satisfied by virtue of such an error.

The appeal will not, however, turn on any alleged error in the admission of hearsay newspaper reports, for there is ample other evidence supporting the district court's conclusion that the purpose of the legislation was not secular but religious. The court's finding that the tendered secular purpose -- the transitional moment -- is pretextual is supported by credited nonhearsay testimony by experts in the educational process. Moreover there was testimony, also credited, by witnesses who attended the Senate and General Assembly Education Committee hearings, suggesting that the primary concern of the legislators supporting the bill was to permit prayer in school. Our examination of the trial court's findings of fact and conclusions of law convince us that its conclusion with respect to the absence of a secular purpose would not have been different had the newspaper clippings been excluded.

Alabama statute, is permissive for students, and the record evidence, we do not believe a finding that the religious purpose was to encourage prayer over other alternatives, rather than to accommodate those wishing to pray, would be sustainable.

Thus the question presented by this appeal narrows to this: May the state, acting through the legislature or through a school board or through an individual teacher, take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray. We do not find any clear answer in *Wallace v. Jaffree*. Nevertheless, while there was no finding in *Wallace v. Jaffree* that the Alabama statute was enacted for the purpose of accommodating prayer, there is also no indication that the secular purpose requirement of the *Lemon v. Kurtzman* test turns on the mandatory as opposed to permissive nature of a statute. Indeed, in contrasting different Alabama statutes, the Court specifically noted that while earlier statutes were mandatory for teachers the statute it was considering was permissive. This distinction, however, was of no relevance to the Court's constitutional analysis. *See Wallace v. Jaffree*, 105 S. Ct. at 2491. Moreover, in the recent case of *Thornton v. Caldor, Inc.*, 105 S. Ct. 2914, 2917 (1985), the Court applied the *Lemon v. Kurtzman* test to strike down a Connecticut statute that was designed to accommodate religious views.[10] Accordingly, because the Supreme Court has expressly required a secular

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10. In *Thornton v. Caldor* the Court concluded that a Connecticut statute, which provided private sector employees with an absolute right not to work on their designated Sabbath, violated the establishment clause. 105 S. Ct. at 2918. Significantly, the Court did not seem to believe that the accommodating purpose of the Connecticut statute made any difference in the Court's establishment clause analysis. *See id.* at 2917.

purpose when considering a constitutional challenge under the establishment clause and because the district court made a finding that N.J.S.A. 18A:36-4 lacked such a secular purpose, we hold the New Jersey statute to be unconstitutional under the first amendment.

III.

The legislators also appeal from the district court's declaratory judgment that fees may be assessed against them. Since, however, no amount of fees had been fixed, that declaratory judgment is interlocutory. *See Bandai America Inc. v. Bally Midway Mfg. Co.*, No. 84-5884, 85-5355 (3d Cir. Oct. 10, 1985)); *West v. Keve*, 721 F.2d 91, 94-97 (3d Cir. 1983); *DeLong Corp. v. Raymond International Inc.*, 622 F.2d 1135, 1138-39 (3d Cir. 1980). Although the district court subsequently fixed a fee amount, the legislators appealed from the declaratory judgment and not the subsequent judgment awarding an actual fee amount. Thus that appeal must be dismissed.

V.

The declaratory judgment that N.J.S.A. 18A:36-4 is unconstitutional will be affirmed. The appeal from the declaratory judgment that the legislators are liable for attorneys fees will be dismissed.

Appendix A

BECKER, *Circuit Judge*, dissenting:

The district court held that the New Jersey minute of silence statute, New Jersey P.L. 1982 Ch. 205, was unconstitutional because it violated all of the elements of the three-part disjunctive test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): (1) it did not have a secular purpose, (2) its primary effect both advanced and inhibited religion, and (3) it fostered excessive governmental entanglement with religion by promoting divisiveness among religious groups. 572 F. Supp. 1561, 1572-76 (D. N.J. 1984). A majority of this panel disagrees with the district court on the second and third points: it finds neither impermissible effect nor excessive entanglement. Majority Op. at ___. With these conclusions I have no quarrel.

Although the majority agrees with the district court that the animating legislative purpose is religious, it reaches this conclusion by an analysis different from that relied upon by the district court. Unlike the district court, the majority interprets the statute to permit, rather than to mandate, student prayer. This reading I believe to be correct. Because of the permissive nature of the statute, the majority concludes that the legislative purpose was not to encourage prayer over other activities, but to accommodate those students who wish to pray in school. Its decision thus turns on the requirement of that the legislature have a secular purpose even when it accommodates religion. The majority holds this accommodation unconstitutional because it accepts the district court's finding that the statute lacks a secular purpose. I respectfully dissent from this holding.

In my view, a permissive and facially neutral statute such as this is presumptively constitutional. This view is supported not only by common sense, but also by statements in *Zorach v. Clausen*, 343 U.S. 306

(1952), and in several of the opinions in *Wallace v. Jaffree*, ___ U.S. ___, 105 S. Ct. 2479 (1985). I also believe that the presumption becomes a strong one where, as here, the panel has concluded that the statute has no impermissible effect and fosters no excessive governmental entanglement with religion. As I see it, under these circumstances, only extremely clear proof that the law is devoid of a secular purpose would justify our holding it unconstitutional; such proof was not produced in this case.

Second, I believe that the majority applied an incorrect standard of review when it deferred to the findings of the district court. *Bose Corp. v. Consumers Union*, ___ U.S. ___, 104 S. Ct. 1949 (1984), dictates that our review in this first amendment case be plenary. Under a plenary review standard, after analyzing the evidence of purpose adduced at trial (and bearing in mind the permissive nature of the statute), I conclude that the statute has a legitimate secular purpose, hence is not infirm. Finally, even under a deferential standard of review, I would not accept the district court's purpose finding because it is unsupported by the admissible evidence. Accordingly I would reverse the judgment of the district court.

In the ordinary course I would commence my discussion with these grounds for reversal. Here, however, in light of what I believe to be the flawed accommodation analysis that informs the majority's position, I shall discuss the accommodation issue first. Unlike the majority, I do not believe that a statute accommodates religion when it lifts no pre-existing impediment to religious exercise and when, in fact, it creates the alleged religious practice in question. The majority, in the exercise of describing the minute of silence statute as religious, has mistaken the permissive nature of the enactment for an active accommodation of religion. I engage in this discussion

of accommodation because this defect is central to the majority's argument, because it emphasizes the unlikelihood that this statute is unconstitutional, and because it is important to identify the confusion in the jurisprudence about the concept of accommodation. As a preface to this accommodation discussion -- and to the opinion itself -- I shall explain in a fashion somewhat different from that employed by the majority, why the statute is permissive.

I. *NATURE OF THE STATUTE*

A. *The Permissive Nature of the Statute*

The statute provides:

> Principals and teachers . . . shall permit students to observe a 1 minute period of silence to be used at the discretion of the individual student, . . . for quiet and private contemplation or introspection . . . .

It is apparent from the face of the statute that the only mandatory word, "shall," is directed at principals and teachers. The language applicable to students is, by contrast, permissive: the minute is to be used "at the discretion of the individual student." Presumably, this language means that students may read, or listen through earphones to radios or tape cassettes, or be excused from class during the minute of silence. As the majority's review demonstrates, *see* Majority Op. at ___, prior drafts of the minute of silence statute and the legislative history of this version fully support the conclusion that, insofar as student participation is concerned, the law is permissive only.[1]

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1. The tape of a segment of a CBS news program that was placed into evidence provides further proof, if any were needed, that the statute mandates no particular behavior on the part of the students. The tape depicted the experience of

Of course, students who are so disposed may engage in silent prayer during the minute of silence. But this activity occurs only because the statute *allows* the students to use the minute of silence at their discretion; the statute neither requires nor encourages prayer. The statute refers to "quiet and private contemplation or introspection." While these activities may outwardly resemble prayer, they frequently involve quite different attitudes of mind. "Prayer," and "private contemplation or introspection," are not synonymous.

Like the majority, therefore, I interpret the statute as permitting, but not coercing, prayer. The majority proceeds to characterize this permissive law as a governmental accommodation of religion. I have strong reservations about the majority's accommodation analysis.

B. *Accommodation of Religion?*

The majority reasons that by providing a minute of silence at the beginning of the school day, the government accommodates those students who wish to pray. Because of the neutrality of the statute and the absence of any pre-existing governmental impediment to silent prayer in schools, I disagree with the interpretation of the statute as an accommodation of religion. Moreover, I have doubts as to whether a statute that creates the purported religious observance

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the public schools in Sayreville, New Jersey, after the enactment of the challenged statute. An actual minute of silence was shown during which students' attitudes and behavior were far from uniform. Their posture can only be described as that of studied irreverence. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2495 n.9 (Powell, J., concurring) ("Given the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple 'moment of silence' as a time for religious prayer. There are too many other subjects on the mind of the typical child.")

can be viewed as an accommodation of religion. While I do not accept the majority's accommodation analysis, the concept of accommodation is murky enough that I admit that the majority's approach *may* be correct. As I have explained, *see supra* at p. 3. it is important for several reasons to clarify the problems with the majority's accommodation analysis, not the least of which is that the majority's resort to the unclear concept of accommodation suggests that this statute is not religious *at all*, and how unlikely it is that it is unconstitutional.

Government accommodation of religion, as opposed to mere tolerance, has been *approved* by the Supreme Court, at least where there is some secular purpose of the governmental practice. *See Lynch v. Donnelly*, ___ U.S. ___, 104 S. Ct. 1355, 1359 (1984). While its contours are not entirely clear, an accommodation seems to consist of the lifting of a barrier to religious observance. Thus, without a release time program, public school attendance requirements would interfere with religious instruction classes. *See Zorach v. Clauson*, 343 U.S. 306 (1952). In his opinion of the Court in *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985), Justice Stevens recognized that a burden on religious exercise exists prior to a government accommodation of religion. He pointed out that at the time of enactment of the Alabama statute under consideration, "there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus, there was no need to 'accommodate' or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause." *Id.* at 2491 n.45.

In her opinion in *Wallace, supra*, Justice O'Connor also described accommodation as a lifting of a governmental impediment to religious practice. 105

S. Ct. at 2505. She concluded that "the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute." *Id.* Similarly, prior to the enactment of the New Jersey minute of silence statute, there was "no governmental practice of impeding students from silently praying for one minute at the beginning of each school day." Under the analysis of two Justices in *Wallace, supra*, therefore, the statute cannot be considered an accommodation.

Moreover, I doubt that accommodation analysis is appropriate when the religious interest in question is created by the very statute that accommodates it. Until the adoption of the minute of silence statute, there was no formally established quiet time during which students in public schools could pray. Thus, the allegedly offending practice -- praying during silent time at school -- was created by the statute. When it concludes that the statute is a governmental accommodation of religion, the majority engages in bootstrapping. The minute of silence statute does not allow for the observance of a pre-existing religious interest, as did, for example, the release time program for religious training approved in *Zorach*. And, if the statute provides for any religious activity at all, it provides for a *new* religious activity; hence, it cannot be said to accommodate an existing one.

There is a potential flaw in the foregoing analysis, one stemming from *Lynch, supra*. It is possible to read *Lynch* as approving the use of accommodation analysis where the religious interest is created by the statute or governmental practice in question and where there was no pre-existing burden to religious observance. The Court in *Lynch* treated Pawtucket's practice of displaying a nativity scene as an accommodation of religion even though the challenged governmental

practice arguably created the religious interest it accommodated, *i.e.*, the interest in viewing the nativity scene. Looking at the problem differently, one might say what was accommodated was not the specific interest created by the government, but rather the more general American religious heritage. Under either interpretation of *Lynch*, the minute of silence statute can be viewed as an accommodation of religion.

Moreover, it is not clear that the nativity display challenged in *Lynch* removed a pre-existing impediment to religious exercise. In fact, if the religious interest that the Pawtucket display accommodated was created by the display itself, there could have been no pre-existing impediment to religious exercise because there was no exercise to impede. Had the municipality not erected a nativity scene, there would have been no governmental impediment to citizens setting up their own creches, although these nativity scenes would require some expenditure of money by individual citizens. More to the point, the *Lynch* Court never considered the existence of any impediment to religious observance in the absence of the municipal nativity scene.[2]

Despite *Lynch*, which is, after all a very different kind of case, I am skeptical about the majority's characterization of the statute as an accommodation of religion. I believe that my colleagues confuse the

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2. I note that Chief Justice Burger characterized the moment of silence statute at issue in *Wallace* as an accommodation of religion. *Wallace*, *supra*, 105 S. Ct. at 2507-08 (Burger, C.J., dissenting). It is significance that Justice Stevens' discussion in *Jaffree* of a pre-existing impediment requirement mentions only "our cases interpreting the Free Exercise Clause." Governmental impediments to religious observance are at the core of free exercise claims. However, Justice Stevens ignores *Lynch*, in which accommodation analysis was used to dispose of a claim that the government had violated the Establishment Clause.

permissive nature of the statute with an active accommodation of religious activity. Because the statute is permissive and facially neutral, the majority understandably has difficulty ascribing a religious nature to it. The only way it can do so, it seems, is by considering the law an accommodation of religion (although, ironically, accommodations of religion have been held *constitutional* by the Supreme Court). The problems with the majority's accommodation analysis emphasize the need for clarification of this area by the Supreme Court. Moreover, the fact that the majority was forced to turn to accommodation in order to ascribe a religious nature to a permissive, facially neutral statute emphasizes how unlikely it is that such a statute is unconstitutional.

C. *The Presumption of Constitutionality*

As we have seen, the statute is permissive and facially neutral, i.e., it makes no mention of religion. In my view, such a statute is presumptively constitutional.[3] When the state has neither given support to a religious group nor enforced any religious observance, it can hardly be said to have established a religion. As I see it, only very strong proof of excessive entanglement, of impermissible effects, or of the absence of any secular purpose will serve to invalidate such a statute.[4] Statements in *Zorach*, *supra*, and *Wallace*, *supra*, underscore the unlikelihood that such a statute will be unconstitutional.

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3. I speak of presumptions not in a technical sense, relating to the parties' burden of proof, but in a broader sense in which it means that such a statute is *probably* constitutional.

4. In this case, the majority has found that the statute has no impermissible effects and does not foster governmental entanglement with religion. Thus, as noted *supra*, the presumption of constitutionality is particularly strong, for it is most unlikely that such an enactment has a purely religious purpose.

Appendix A

In *Zorach*, the absence of governmental coercion indicated to the Supreme Court that a school that released students during the day for religous study violated neither the Establishment nor the Free Exercise clauses. The Court's reasoning was clear, and its holding unequivocal:

> No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. he is left to his own desires as to the manner or time of his religious devotions, if any.
>
> There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence on the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, it it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.

343 U.S. at 311 (footnotes omitted). The lesson of *Zorach*, then, is that so long as authorities do not force students to participate, the authorities may allow and provide time and room for voluntary religious participation.

The *Zorach* reasoning applies directly to the statute at issue here. No student is forced to observe a minute of contemplation, much less prayer. Each student is left to his or her own desires as to how to use that time, and the state is neutral. The statute does no

more than provide students who wish to pray silently with an opportunity to do so undisturbed by noise.

At least one other case supports the proposition that moment of silence statutes that are permissive and facially neutral presumptively have a secular purpose. In *Abington School District v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring), Justice Brennan said that "the observance of a moment of reverent silence at the opening of the class [may serve] the solely secular purposes of devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." (quoted in *Wallace, supra*, 105 S. Ct. at 2499 (O'Connor, J., concurring)).

The vitality of such reasoning has recently been reaffirmed in *Wallace*, which, like the instant case, involved a moment of silence statute. The statute at issue in *Wallace* gave each teacher the discretion to announce a period of silence in her or his classroom; however, if the teacher did impose the minute of silence, the students were *required* to pray. The Supreme Court found the statute unconstitutional. In doing so, the Court gave clear indication that a statute that did not require, but merely permitted, a student to pray, would be constitutional.

In his opinion for the Court, in which Justices Brennan, Marshall, and Blackmun joined, Justice Stevens explicitly distinguished the statute before the Court from a statute, like the one before us, that allows students opportunity to pray but does not mandate prayer:

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an

> appropriate moment of silence during the school day.

Id. at 2491. I believe it to be implicit in this discussion that statutes that "merely protect[] every student's right to engage in voluntary prayer" carry a strong presumption of constitutionality.

The concurring and dissenting opinions in *Wallace, supra*, lend further support to this view. In her concurring opinion, Justice O'Connor stated that "[b]y mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period." *Id.* at 2499 (O'Connor, J., concurring). This statement is a reaffirmation of the *Zorach* principle as applied to moments of silence: if the legislation allowing for such moments does not endorse religious activity, it is not unconstitutional. And Justice Powell observed that he would "vote to uphold the Alabama statute if it also had a clear secular purpose" in addition to the religious purpose for which it was enacted. 105 S. Ct. at 2495. The citation he used to support this statement implies that he would discern secular purpose from the face of some statutes. He said, "See *Mueller v. Allen*, ___ U.S. ___, ___, 105 S. Ct. 3062, ___, 77 L.Ed.2d 721 (1983) (the Court is 'reluctan[t] to attribute unconstitutional motives to the state, particularly when a plausible secular purpose may be discerned from the face of the statute')." *Id.* I believe that the text of the statute, reflects a clear secular purpose, *i.e.*, the providing of a moment of calm before the beginning of classes. *See also infra* pp. 30-31.

In their dissenting opinions in *Wallace*, Chief Justice Burger and Justice White emphasized the absence of coercion as a reason for holding the Alabama statute unconstitutional. The Chief Justice described the statute in *Wallace* thus: "Without

pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes -- as Congress does by providing chaplains and chapels." 105 S. Ct. at 2507-08 (Burger, C.J., dissenting). He went on to state, "[i]f the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require." *Id.* at 2508.

According to Justice White, "if a student asked whether he could pray during [the moment of silence], it is difficult to believe that the teacher could not answer in the affirmative." *Id.* (White J., dissenting). This suggests, I think, that Justice White would consider a statute constitutional if it permitted but did not require, prayer.

The *Wallace* opinions also emphasize how improbable it is that a permissive, facially neutral statute will fail the effects test of *Lemon*. In his concurring opinion, Justice Powell stated that "the 'effect' of a straighforward moment-of-silence statute is unlikely to 'advanc[e] or inhibi[t] religion'." 105 S. Ct. at 2495. Justice O'Connor provided a lengthier explanation of why a mere minute of silence, without any encouragement to pray, passes the effect test of *Lemon*. She stated:

> First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is

> not compelled to listen to the prayers or thoughts of others . . . . It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

105 S. Ct. at 2498-99. Under this reasoning, it is hardly possible to hold that the statute challenged here has the effect of advancing or inhibiting religion. And, indeed, the majority has conceded that the New Jersey minute of silence has no unconstitutional effect.

Logic, precedent, and the writings of a majority of the Justices suggest that a permissive, facially neutral statute such as the New Jersey moment of silence law, which has no impermissible effects and fosters an impermissible entanglement, carries with it a strong presumption of constitutionality which only the clearest proof of an absence of secular purpose can vitiate. With the nature of the New Jersey statute in mind, I turn to an analysis of its purpose, the ground upon which the majority finds the law unconstitutional. As I demonstrate in part II, clear proof of the absence of a secular purpose is surely lacking here.

II. *THE STATUTE'S SECULAR PURPOSE*

The majority affirms the holding of unconstitutionality, because it believes that it cannot overturn the district court's finding that the statute lacks a secular purpose. I believe that the majority proceeds under an erroneous standard of review. I shall first explain why I believe that *Bose Corp. v. Consumers' Union*, ___ U.S. ___, 104 S. Ct 1949 (1984), requires that our standard of review in this case should be plenary. Next, I shall engage in plenary review of the evidence bearing on legislative purpose, and explain why I believe the evidence shows that the statute had a secular purpose. Finally, I shall

demonstrate that even under a deferential standard of review, the district court's purpose finding is unsupportable.

A. *The Relevance of* Bose.

In *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984) the Supreme Court held that an appellate court is required to exercise plenary review of a lower court's finding of actual malice in a libel case. The majority would apparently limit *Bose* to its facts, exercising plenary review only in libel or defamation cases. I believe that this limitation represents a misreading of *Bose*. *Bose*'s language and reasoning were broad; it drew from precedents in a number of first amendment cases. Because I read *Bose* as a statement about the role of appellate courts in first amendment cases generally, I believe that it dictates our scope of review here.

The *Bose* determination of whether a speaker or writer had "actual malice," like the determination of whether a legislature had a secular purpose, is a factual question concerning intent. Because it is a factual question, Fed. R. Civ. P. 52(a) would appear to require federal appellate courts to review district court's findings on the matter under a deferential standard. In *Bose*, however, the Court held that as a matter of constitutional law, plenary review was required:

> The requirement of independent appellate review . . . is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form in our common law heritage. It reflects a deeply held conviction that judges -- and particularly members of this Court -- must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

104 S. Ct. at 1965. In my view, this language is applicable to *any* findings of a district court that implicate a party's first amendment interests. Indeed, the Court arrived at its position in *Bose* after a lengthy review of first amendment cases. It pointed out that it had exercised plenary review in cases involving libel, fighting words, incitement to riot, obscenity and child pornography. *Id.* at 1961-63.

Although the majority in this case apparently would have it differently, the Court regarded *Bose* not as an aberration but as an imperative of first amendment principles and jurisprudence. Plenary review is necessary to protect the delicate balance that the first amendment entails. As the Court explained, "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 1962 (footnote omitted). Under *Bose*, plenary review is appropriate in a first amendment case whenever important "constitutional facts" are at issue, that is, whenever the district court's findings of fact presuppose a legal standard and have potentially grave effects on first amendment rights. The Supreme Court has recently stated this general principle: "Where, for example, as with proof of actual malice in First-Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, 54 U.S.L.W. 4022, 4025 (1985). *See also Bender v. Williamsport Township*, 741 F.2d 538, 542 n.3 (3d Cir. 1984) ("in the area of 'constitutional fact,' an appellate court is

free to draw its own inferences from the record"), *cert. granted*, ___ U.S. ___, 105 S. Ct. 1167(1985).[5]

It should be clear that plenary review is appropriate in this case. Whether the statute had a permissible purpose is an important constitutional fact, for permissibility is determined by a legal standard and potentially grave effects on first amendment rights are at stake. Indeed, as noted above, the fact at issue here is similar to the one at issue in *Bose* in that both the determination of actual malice and that of secular purpose involve inquiries into states of mind, guided by complicated legal standards. Distinguishing what is religious from what is secular is a process as overlaid with constitutional considerations as deciding the difference between protected and unprotected speech. The principles that underpin *Bose* are thus equally forceful here.

To complete my argument in favor of plenary review, I will consider here two distinctions that one might arguably draw between the instant case and *Bose* and explain why I believe that neither is material. First, one might argue that *Bose* should be limited to cases where an appellate court reviews decisions *denying* assertions of first amendment rights, whereas the district court's decision in this case arguably upholds the expressive rights of citizens. I do not believe, however, that the scope of review in first amendment cases is determined by which side is favored by the district court. The appellate court's concern should be to draw first amendment

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5. That *Bender* involved appellate review of a summary judgment record whereas we have a full record in this case replete with factual disputes is not material. There was a disputed factual record in *Bose*. The appellate court's responsibility to exercise plenary review is constant no matter how the case before it arose; the inferences may be drawn from disputed as well as from undisputed records.

boundaries *correctly*, not to favor one side over the other. Moreover, in its extensive summary of cases, *see* 104 S. Ct. at 1961 - 63; *supra* at 15-16, the *Bose* Court cited cases in which the lower court had both upheld and denied first amendment claims; the Court did not distinguish between the two sets of cases. Thus, the first arguable distinction is simply not tenable.

Second; one might argue that *Bose* should be limited to cases involving speech, and perhaps to cases involving free exercise claims, but should not be extended to establishment cases. This position requires the implicit assumption that plenary review is more important when freedom of speech (or free exercise of religion) is at issue because an erroneous determination that speech (or religious exercise) is unprotected inhibits the expression of individuals' ideas and thus impairs personal freedom. To make explicit this assumption is to reveal its falsity, for one of the most fundamental of the Founding Fathers' tenets was that individuals must be free from governmentally imposed religion. The constitutional prohibition of established religion is surely as important as the guarantee of freedom of speech.[6]

In the next section, I shall examine under a plenary standard of review the evidence relating to the purpose of the statute.

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6. Indeed in Bob Jones University v. United States, 461 U.S. 574 (1983), decided a year before *Bose*, the Supreme Court reviewed the district court's determination whether an institution's purpose was primarily educational or religious under a plenary standard of review. *See also* Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue, 743 F.2d 148, 158 n.9 (3d Cir. 1984) (Tax Court's determination that a publishing house was not sufficiently connected with a church to qualify for tax-exempt status was not entitled to deferential standard of review); *Cf.* Bender v. Williamsport Township, 741 F.2d 538 (3d Cir. 1984) (plenary review of whether speech was secular or religous).

Appendix A

B. *Evidence of Legislative Intent*

The evidence presented to the district court may be classified in five categories: testimony of three witnesses who were present at legislative hearings; newspaper accounts of the hearings; evidence of the perceptions of various citizens and citizens' groups of New Jersey about the statute's purpose; expert testimony about the pedagogical value of the statute; and seventeen prior bills proposing moments of prayer or moments of silence. I shall consider these in turn, and also consider one final piece of evidence of legislative purpose, the text of the statute itself.

1. Three people who attended the legislative hearings testified to legislators' statements concerning the religious purpose of the statute. Although the statute was debated by the full assembly and the full senate, the witnesses mentioned only two assembly members who ever referred to religion: Ms. Rhodes and Mr. Chuman repeated statements reflecting a religious purpose made by Assemblyman Zangari, and Reverend Sarfarty described a similar remark make by Assemblyman Adubato.

This evidence is simply insufficient to support a finding of a religious intent on the part of the legislature. In the first place, given its paucity, the evidence is at best underwhelming. Two assemblymen cannot be said to speak for the intent of the entire assembly and senate. *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."). Yet there is no evidence on the record that any other assemblymember or senator had a religious purpose in mind. More importantly, even this testimony is equivocal because each of the witnesses also testified to legislators' statements that the statute

had a secular purpose.[7] Because we may not invalidate a statute that has *a* secular purpose, *Lemon, supra*, 403 U.S. at 611; *see also Wallace*, 105 S. Ct. at 2490, testimony that reveals both a religious and a secular purpose cannot support a finding of unconstitutionality.[8]

2. The district court also relied on newspaper articles describing the legislative hearings on the statute. Because the New Jersey legislature does not keep a record of its hearings and debates and because the district court excused the legislators from

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7. Mr. Chuman's testimony on the point was as follows:

QUESTION: You said you heard Senator -- or Assemblyman -- James Zangari testify?
ANSWER: Yes.
QUESTION: Do you recall what he stated -- was he in favor of the adoption of this law?
ANSWER: Oh, very much so.
QUESTION: Did he state his reasons?
ANSWER: Well, yes he did. he thought that the moment of silence would be useful in the schools and would serve an educational purpose.
QUESTION: What purpose?
ANSWER: Educational purpose.
QUESTION: A teaching purpose?
ANSWER: Yes.
QUESTION: Did he expand on that and say in what way?
ANSWER: he may have, but I don't recall.

Ms. Rhodes and Reverend Sarfarty recounted statements by other legislators that described the minute of silence as an opportunity for the students to collect their thoughts and prepare for the day's learning and as an aid in the creation of discipline and order.

8. By contrast, in *Wallace*, the testimony of Senator Holmes, the sponsor of the bill concerning the religious purpose of the moment of silence, was unrelieved by statements concerning a secular purpose.

testifying about their motives in enacting the statute,[9] the district court found that there was sufficient necessity to admit the articles under the residual hearsay exception, Fed. R. Evid. 803(24).[10] The

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9. The majority states that "the district court's recognition of a legislative privilege not to testify in a case in which legislative purpose is an issue may itself have been an error." *See supra* at ___ n.9. For support of this view, it relies upon United States v. O'Brien, 391 U.S. 367 (1968), in which the Supreme Court stated that it would look to statements by legislators for guidance "in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *Id.* at 383 n.30. However, the *O'Brien* Court was not referring to depositions or other testimony taken from legislators, but to statements contained in the official record of the legislative proceedings. In my view, the district court acted fully within its discretion in refusing to allow the plaintiffs to depose New Jersey legislators. Although the testimony in question does not fall within the provisions of either the federal or the state constitution, there may well be a common-law speech and debate privilege that protects the legislators in this situation. At all events, it would be unseemly to parade legislators before the court to testify about their intentions in enacting a statute, and, more important, the reliability of such testimony would be highly suspect. Legislators, concerned that the statute might be held unconstitutional, could view their intentions differently in hindsight. As Justice O'Connor stated in Wallace v. Jaffree, 105 S. Ct. at 2500 ("[i]t is particularly troublesome to denigrate an expressed secular purpose due to post-enactment testimony by particular legislators . . . ."). Thus, even if there is no common-law privilege, such testimony would be subject to a ruling that it is inadmissible under Rule 403, for its probative value is substantially outweighed by the danger that it will be inaccurate and therefore confuse the issues.

10. Ordinarily, when offered to prove the truth of the matters stated therein, newspaper articles are held inadmissible as hearsay. *See, e.g.*, Pallotta v. United States, 404 F.2d 1035 (1st Cir. 1968); Poretto v. United States, 196 F.2d 392 (5th Cir. 1952); De La Cruz v. Dufresne, 533 F. Supp. 145 (D.

newspaper reports admitted suggested that the purpose behind the statute was to return prayer back into the public schools, surreptitiously.

There are two problems with the newspaper evidence. First, I do not believe that the newspaper accounts satisfy the requirements for admission of Fed. R. Evid. 803(24).[11] That section reads, in relevant part, as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (24) *other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statment is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of

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Nev. 1982). Robert Stigwood Group v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), *rev'd on other grds.*, 530 F.2d 1096, *cert. denied*, 429 U.S. 848 (1976); United States v. Crocker-Anglo National Bank, 277 F. Supp. 133, 183 n.36 (1967). See also Annot., *Admissibility of Newspaper Articles as Evidence of the Truth of the Facts States Therein*, 55 ALR3d 663. These authorities do not discuss the applicability of Rule 803(24), however.

11. The majority, too, had some doubts about the admissibility of these documents. *See* Maj. Op. at ___. The majority concluded, however, that if the evidentiary ruling was indeed error, it was harmless because there was ample other evidence supporting the trial court's conclusion that the legislative purpose was religious.

justice will be served by admission of the statement into evidence.

The legislative history of the Rule indicates that it was to be narrowly construed and invoked only sparingly. *See* S. Rep. No. 1277, 93d Cong. 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 7051, 7056; H.Conf.Rep.No. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 7051, 7106. *See also In re Japanese Electronics Products*, 723 F.2d 238, 302 (1983) ("We note, moreover, that those exceptions are intended to have a narrow focus."); *United States v. Bailey*, 581 F.2d 341, 346-47 (3d Cir. 1978); *Robinson v. Shapiro* 646 F.2d 734, 742 (2d Cir. 1981); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979).

It is clear that two of the explicit prerequisites of Rule 803(24) were not met. As the majority has observed, Maj. Op. at ___, n.9, the plaintiffs made no showing of inability to locate observers who attended the legislative debates about the statute and three of them in fact testified. The live testimony of these witnesses was far preferrable to newspaper accounts of the debate, and, while the plaintiffs might have been able to get the names of additional observers through reasonable efforts, they made no effort to do so. *Cf. Debra P. by Irene P. v. Turlington*, 730 F.2d 1405 (11th Cir. 1984) (consulting firm's report admitted pursuant to 803(24) only after a showing that there was no better available evidence). Thus, the newspaper clippings did not satisfy the 803(24)(B) requirement that the evidence be more probative than any other evidence that the plaintiffs could have procured through reasonable efforts.

Nor did the clippings have the requisite "circumstantial guarantees of trustworthiness." Courts admitting evidence under 803(24) require some showing that "the declarant's perception, memory,

narration, or sincerity," are reliable. *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979).[12] Under this standard, the newspaper reports are of dubious validity. On the basis of the record, we do not know *anything* about the reliability of the articles; perception, memory, narration, and misrepresentation all present potential problems. The reporters may have been present for only part of the hearings they reported, and may not correctly have remembered or interpreted the speeches they heard. They may have simply recorded their impressions of the hearings, in which case the clippings would provide only very slender evidence of legislative intent. We have no idea of the amount of editorializing that went into the articles, which could have been written from a biased point of view. It is not unknown for reporters to stretch some facts or omit others in order to arouse public indignation.[13]

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12. *See also* Weinstein & Berger, *Evidence* ¶803(24)(1): "Such factors as the nature -- written or oral -- and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which it was made must be assessed. Also significant are the knowledge and qualifications of the declarant." (Footnotes omitted.)

13. *Cf. Pittsburgh Press Club v. United States*, 579 F.2d 751, 759-60 (3d Cir. 1978) (ruling a survey inadmissible under Rule 803(24) because it "lacked the necessary safeguards of accuracy and flexibility") The court stated that "[i]n the context of polls and surveys, the circumstantial guarantees of trustworthiness are for the most part satisfied if the poll is conducted in accordance with generally accepted survey principles, and if the results are used in a statistically correct way, since proper survey and statistical methods are intended to assure a poll's reliability." *Id.* at 758. Not only are there no comparable generally accepted principles of reporting, so that the entire process is less reliable than poll-taking, but we also know nothing of the methods or motivations of the reporters who wrote the articles that were admitted into evidence.

I thus conclude that the newspaper accounts were inadmissible.[14]

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14. This conclusion is unaffected by Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), relied upon by appellees. In *Dallas County*, which was decided before the adoption of the Federal Rules of Evidence, the court held a newspaper article admissible under Fed. R. Civ. P. 43(a), using the kind of approach later codified in Rule 803(24). The reasons the court gave for finding that the article met the hearsay requirements of necessity and trustworthiness are not present in this case. The article in *Dallas County* was more probative than any other evidence that could be obtained through reasonable efforts because the fire it described had occurred fifty-eight years before the trial. 286 F.2d at 396. Indeed, the *Dallas County* court went on to state that the rationale behind the "ancient documents" exception to the hearsay rule was applicable to the newspaper article in question. *Id.* Unlike the fifty-eight-year-old article at issue in *Dallas County*, the newspaper clippings admitted in this case cannot even be considered ancient documents, for under Fed. R. Evid. 803(16), an ancient document is twenty years old.

Similarly, the *Dallas County* court's analysis of trustworthiness does not necessarily apply the articles admitted in this case. The article admitted in that case described a fire in a public building in a small town, an event that a reporter could not fabricate without embarrassment. Unlike a fire in a public building, the statements of New Jersey legislators at hearings concerning the bill are not facts of such a public nature that they would be generally known throughout the community. While it might be inconceivable that a reporter would state that legislative hearings occurred when in fact they did not, it would not be inconceivable that he or she might, either consciously or unconsciously, give a skewed or one-sided account of what was said at the hearing. Fear of embarrassment is not such a powerful guarantee of truthfulness in this case, both because the nature of the material reported is more subjective and because the reporters were not writing for small, close-knit communities.

The second problem with the newspaper evidence is that, even if the accounts were admissible, they are ambiguous at best in establishing that the legislature had forbidden motivations in passing the statute. The newpaper accounts contain descriptions of legislators' secular purposes, as well as statements about returning prayer to the schools. For example, one article on which plaintiffs rely quoted Assemblyman Zangari as saying, *inter alia*, that "regardless of what some people say, this is not a prayer bill. Rather it allows each student to participate in a one-minute period of voluntary silence to be used at his or her own discretion." *The Star Ledger*, P. ___, col. ___, Oct. 25, 1982. It appears to me that this is clear evidence of a *secular* purpose that the majority and the district court have ignored.

3. Another source of evidence of religious purpose is citizens' perceptions of the statute. Proceeding under the theory that "[i]t is significant what those who opposed the Bill conceived its purposes and effects to be, because in many instances they were among those most directly affected by it," *May v. Cooperman*, 572 F. Supp. at 1565, the district court considered reaction to the statute by the Ethical Culture Society of Bergen County, the New Jersey School Board Association, the American Baptist Churches of New Jersey, the New Jersey Education Association, and several parents of public school students.

I believe that this evidence is very weak. Community perception is simply too amorphous and unreliable to provide the ground for constitutional decisions. The opinions and perceptions of the community are shaped by many factors -- editorials, personal biases, gossip, news broadcasts, and peer pressure, for example. Such perceptions are thus unreliable indicators of what the legislative purpose of

the statute in fact was.[15] These problems were exacerbated by the district court's notion that the perceptions of those who *opposed* the statute were particularly valuable. The perceptions of those who oppose the statute were no truer or more reliable than the perceptions of the statute's supporters. Thus, in addition to being inherently unreliable, the evidence that the district court heard was likely skewed.[16]

4. The district court heard three experts testify about the effectiveness of the minute of silence as a teaching device. Dr. Scrupski, an associate professor at Rutgers Graduate School of Education, testified that the minute of silence served a useful pedagogical function by creating a boundary between school and non-school time. The boundary was important, Dr. Scrupski explained, because it would emphasize to the students the importance of the school hours, and the fact that school hours were a time for serious work rather than undisciplined play. Dr. Kurilloff, an associate professor of education at the University of Pennsylvania, and Dr. Rosner, a professor at the Temple College of Education, testified that they believed that the moment of silence before class would not be a valuable educational tool.

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15. I have found only one case, Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983) in which a court found public perception probative of legislative intent. *Duffy* is distinguishable because in that case there was significant direct evidence of legislative intent and the evidence of public perceptions was primarily cumulative; here, however, the other evidence of legislative intent is scant. If *Duffy* is not distinguishable, then I think that it was incorrectly decided, for the reasons stated in the text.

16. It is interesting to note that in her opinion in *Wallace*, Justice O'Connor described community perception of a minute of silence as evidence of impermissible *effect*, rather than of impermissible purpose. 105 S. Ct. at 2500-01.

Once again, I find the evidence inadequate to support a finding of no secular purpose. Not only was the testimony that there is no pedagogical merit to a minute of silence contested, but even if it had stood alone and uncontradicted it would not establish lack of secular purpose. The testimony of the plaintiffs' experts may cast doubt upon the *effectiveness* of the statute as a transitional, or boundary, device. But proof that the statute was an unwise or ineffective measure is not proof that it lacked a secular purpose. It is significant only if the statute seems so patently ineffective or irrelevant with respect to the alleged secular purpose that it is unreasonable to believe that the legislature enacted the statute to serve that purpose. The expert testimony in this case could not give rise to such an inference; indeed, as noted, there was disagreement among the experts as to the pedagogical merit of the statute. Under the circumstances, the expert testimony was of little value in establishing the lack of a secular purpose.

5. The district court described the attempts by prior New Jersey legislatures to pass a minute of silence or moment of prayer statute. This evidence has a more prominent role in the majority's opinion than it did in the district court's. It is clear, however, that both the district court and the majority consider the perceived purposes of the previous bills to be indicative of the purpose underlying the statute.

I believe that the previous bills are irrelevant. The bills were submitted to different legislatures with significantly different memberships. The overlap between the sponsors and supporters of the statute and the sponsors and supporters of the previous bills is minimal. Thus the circumstances surrounding the prior bills supply little evidence of the legislative purpose behind the present enactment. Earlier drafts of the *same* bill can shed light on the intent behind the

final formulation, but the histories of completely separate bills have no such relevance.

6. The final evidence of legislative purpose may not be properly classifiable as evidence at all: the language of the statute itself. But the Supreme Court has stated that "a plausible secular purpose for [a] state's program may be discerned from the face of the statute." *Mueller v. Allen*, ___ U.S. ___, ___, 103 S. Ct. 3062, 3066 (1983). Here the neutral language of the statute is evidence in favor of a secular legislative purpose, *i.e.*, the providing of a moment of calm before the beginning of classes.

In sum, reviewed under a plenary standard none of the evidence on which the plaintiffs rely is sufficient, separately or cumulatively, to prove an absence of any secular purpose behind the statute. The evidence is equivocal at best, and much of it may be irrelevant. The single unambiguous piece of evidence -- the face of the statute itself -- attests to the secular motives of the legislators. Parts of the testimony of the witnesses who attended the hearings also support this conclusion. I therefore believe that the statute has a secular purpose, that it is therefore constitutional, and that the majority is in error.

In the next section, I shall explain that I would reach the same conclusion even if we were obliged to defer to the findings of the district court.

C. *Result Under a Deferential Standard of Review*

My conclusion that a statute is constitutional does not depend on either the standard of review I have employed or the admissibility of the newspaper clippings. Even if we were required to defer to the district court's findings, and even if the newspaper articles were admissible under Fed. R. Evid. 803(24), I would vote to reverse the judgment of the district court.

All that is required by *Lemon* is *a* secular purpose. *Wallace, supra*, 105 S. Ct. at 2494 (Powell, J., concurring) ("We have not interpreted the [purpose] prong of *Lemon, supra*, however, as requiring that a statute have 'exclusively secular' objectives."); *Lynch, supra*, 104 S. Ct. at 1363 n.6 ("We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires."). Indeed, the Supreme Court has refused to hold unconstitutional, on the ground that there was some secular reason for them, practices that would seem to be purely religious. In *Lynch*, for example, the municipality's celebration of Christmas and its depiction of the origins of that holiday were considered legitimate and sufficient secular purposes.

The evidence simply does not demonstrate that the statute lacks any secular purpose. Although the newspaper articles and the testimony of persons who attended the legislative hearings reveal that some legislators had prayer in mind, these very sources of evidence also contain descriptions of a secular purpose, the purpose of providing a moment of calm before the beginning of classes. As the Supreme Court has stated, "a statute that is motivated in part by a religious purpose may satisfy" the purpose prong of *Lemon*, as long as it has a secular aim, also. *Wallace, supra*, 105 S. Ct. at 2490.

Although under a deferential standard of review, I would accept the district court's decision to believe the plaintiff's expert witnesses and to disbelieve the conflicting expert testimony, I still find that this evidence about the *effectiveness* of the legislation has little bearing on its purpose. Nor do evidence of community perception of the legislative intent or the history of the seventeen prior minute of silence bills have much probative value in a purpose inquiry. Against this weak and possibly irrelevant evidence

stands the permissive and neutral wording of the statute, with its strong indicia of constitutionality, *see* Part I, *supra*, bolstered by statements in newspaper articles and observer's testimony that at least some legislators endorsed the statute for a secular reason. I therefore conclude that the district court clearly erred in finding that the statute had no secular purpose.

III. *CONCLUSION*

In sum, I agree with the majority that the statute is permissive and that it neither produces impermissible effects nor fosters excessive governmental entanglement with religion. Although the characterization of the statute as an accommodation of religion is not determinative of its constitutionality, I nonetheless have serious reservations about the majority's accommodation analysis and believe that its flaws emphasize how unlikely it is that the statute is unconstitutional. In my view, a permissive and facially neutral statute such as the New Jersey moment of silence is presumptively constitutional; that the presumption is all the stronger when, as here, the enactment passes the entanglement and effects test of *Lemon*; and that such a presumption cannot be overcome in the absence of clear evidence of a secular purpose.

I find that the evidence concerning lack of a secular purpose in the case does not overcome this presumption of constitutionality. I reach the same conclusion both under the plenary standard of review that I believe must employ and under the deferential standard that the majority employs. I therefore would reverse the judgment of the district court. Accordingly, I respectfully dissent.

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of the United States District Court for the District of New Jersey

(Filed—October 24, 1983)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 83-89

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually,

Plaintiffs,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants.

Appendix B

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and

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate and the NEW JERSEY SENATE,

Defendants-Intervenors.

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Appendix B

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Debevoise, District Judge.

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§2201 and 2202. Plaintiffs seek to have declared unconstitutional a State statute, namely, New Jersey P.L. 1982, Ch. 205 which provides that:

Appendix B

1. Principles and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

2. This act shall take effect immediately.

Plaintiffs are public school children and parents of such children who either are not religious and view the minute of silence as an enforced religious observance or else are religious and oppose required participation in this particular observance. One plaintiff, Jeffrey May, is a teacher in the Edison Township school who declined to conduct a minute of silence in his classroom on the ground that it is a religious observance and who was threatened with discipline for this failure.

Defendants are Saul Cooperman, Commissioner of New Jersey's Department of Education which is responsible for implementing the minute of silence bill, the Edison Township Board of Education and the Old Bridge Township Board of Education.

The statute became effective on December 16, 1982 when the New Jersey State Senate overrode the Governor's Veto, the Assembly having overridden the veto on December 13. By reason of the aproaching Christmas recess the full effect of the statute was not felt until January 1983, when the public schools reopened.

This action was filed on January 10, at which time I issued an order temporarily restraining implementation

of the statute. Subsequently the parties and the New Jersey Assembly and New Jersey Senate, which intervened as defendants, agreed to an extension of the temporary restraint until the trial of the case, thus in effect converting the temporary restraining order into a preliminary injunction.

The original defendants did not take an active role in the defense of the case. This inactivity flowed, no doubt, from the fact that the State's Governor and Attorney General had concluded that the statute violated the United States Constitution and that they could not in good faith defend it. However, the intervening defendants vigorously contested the action both during pretrial discovery proceedings and at the trial itself.

The trial commenced on September 13, 1983. Both sides produced extraordinary useful witnesses. Each witness was articulate and effectively testified as to a significant aspect of the case. The witnesses viewed the statute, its purpose and effect from very different perspectives. Each witness held strong views concerning the educational and/or religious implications of the statute. All of their views were essential for an understanding of the issues and contributed significantly to the resolution of these issues.

The Facts

In the early 1960's the United States Supreme Court held that school-sponsored prayer and Bible reading in the public schools are unconstitutional. *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962). These decisions

required modification of the exercises which traditionally had been conducted in New Jersey's public schools at the start of each day. These exercises typically include reading from the Old Testament and recital of the Lord's Prayer.

There was very substantial opposition to the Supreme Court's decisions, and in many parts of the United States various measures were proposed to change the ruling or evade it. In New Jersey legislation was proposed from time to time with the rather obvious purpose of reintroducing opening prayer in some form in the public schools.

At first such proposed legislation specifically mentioned prayer. For example, A. 146 (1969), which authorized "a brief period of silent prayer or meditation", was vetoed by Governor Hughes who had doubts as to its constitutionality. In 1971 a similar bill (A. 597 (1970)) was vetoed by Governor Cahill on similar grounds.

In 1978 the legislature adopted A. 648 which mandated "a brief period of silent meditation" at the beginning of each day and explicitly disavowed any intent to create a religious exercise. Governor Byrne declined to approve the bill and it failed to become law. He based his decision in part on the bill's possible violation of the Establishment Clause or the Free Exercise Clause of the First Amendment and in part on the lack of any useful purpose of the bill.

In 1980 Assemblyman Zangari introduced A. 2197 which called for a one minute period of silence in each public school during each school day. On May 4, 1981 Governor

Byrne returned this bill unsigned on the grounds that it was either unconstitutional or unnecessary.[1]

The statute which is the subject of this case was introduced as Assembly Bill No. 1064 on March 8, 1982. Its principal sponsor was Assemblyman Zangari, who was joined by 54 other members of the Assembly. Assemblyman Zangari had previously introduced three other bills on related subjects: one calling for an amendment to the United States Constitution to permit prayer in public places, including public schools (A. 162 (1980)), another providing for a period of prayer or scripture reading in each school before the beginning of the school day (A. 2196 (1980)), and still another providing for a one minute period of silence after the beginning of each school day (A. 2197 (1980), referred to above).

The New Jersey legislature does not preserve an official record of its hearings and debates, and consequently this source of information concerning the purpose of legislation is not available.[2] However, several witnesses des-

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[1] It would seem that the minute of silence law under review in this case is the eighteenth in a series of school prayer or moment of silence bills introduced in the New Jersey legislature since 1970. Drakeman, Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional? 35 Rut. L. Rev. 341 (1983) (*see* footnote 92 at 356 for a listing of the bills).

[2] During the pretrial phase of this case plaintiffs sought to fill the gap left by the absence of a legislative record by taking the depositions of individual legislators and otherwise subjecting them to discovery. I concluded that although the legislative privilege contained in the federal constitution is not available to the state legislator and although the legislative privilege contained in the State

(Footnote continued on following page)

cribed some of the legislative committee meetings which they attended by reason of their interest in the Bill.

Joseph Chuman, leader of the Society for Ethical Culture for Bergen County testified in opposition to the Bill before Senator Feldman's Education Comittee on June 21, 1982. The hearing on the Bill lasted 1½ to 2 hours. Three committee members, including Senator Feldman, were present. Two representatives of education organizations and a representative of the American Civil Liberties Union spoke against the Bill. Assemblyman Zangari spoke in favor. He argued that it would serve a useful psychological purpose. He pointed out that although he was a Catholic he went to Protestant schools and was encouraged to participate, which never did him any harm. When Chuman spoke to him afterwards Assemblyman Zangari asserted that he would be happy to see verbal prayer and Bible reading in the schools. Asked about the effect on atheists, he stated that they were so few in number their views could be discounted. Mr. Chuman could recall no discussion before the Committee of the education purposes of the Bill.

(Footnote continued from preceding page)

constitution is not available in § 1983 actions asserting deprivation of federal rights, for general policy reasons the law does not permit individual state legislators to be subjected to discovery in civil cases involving the interpretation or validity of state legislation absent very compelling reasons. Such reasons did not exist here. However, I also concluded that the absence of any official record of legislative proceedings and the inability to depose individual legislators created a situation in which it was more likely that otherwise inadmissible sources of information might be admitted into evidence as indicative of legislative intent, *e.g.*, newspaper accounts of proceedings admitted as an exception to the hearsay rule under Evid. R. 803 (24).

Appendix B

Marianne Rhodes, Associated Director of Government Relations of the New Jersey School Board Association, attended a May 17, 1982 hearing of an Assembly Committee and a September 23, 1982 hearing of the Senate Education Committee. She made memoranda of the discussions concerning Bill A. 1064. At the Assembly Committee hearing Assemblyman Zangari stated that the Bill had been reduced to 54 words and that it was important that society get back to deeply embedded religious values. He quoted President Reagan as advocating adoption of a constitutional amendment allowing school prayer.

Ms. Rhodes recorded that at the September 23 Senate hearing Senator Ewing and Assemblyman Zangari spoke for the Bill. In response to Senator Feldman's question why the Bill was necessary since students could pray whenever they wished, Assemblyman Zangari stated that "They [students] publicly won't do it [pray] unless they are directed."

The Rev. Dudley E. Sarfaty is Associate General Secretary of the New Jersey Council of Churches, a group composed of representatives of 15 Protestant denominations. He attended the sessions of the Assembly at which the question of overriding the Governor's veto was debated. He made notes of these sessions. Assemblyman Michael F. Adubato urged that it would be a good thing if the State subsidized parochial education, and the Bill was a step in the right direction. Senator Dumont stated that the kind of ceremony required by the minute of silence Bill would cut down crime and disruption and that the legislature should not be rigid on matters of church and state. Senator Cardinale asserted that "We know what the people want" and asked rhetorically whether the mem-

bers of the State Senate were the servants of the people or the courts. The only argument which Rev. Sarfaty heard touching on possible educational benefits of the Bill was Senator Dumont's assertion that the minute of silence would cut down crime and disruption.

It is significant what those who opposed the Bill conceived its purposes and effect to be, because in many instances they were among those most directly affected by it.

The Ethical Culture Society of Bergen County styles itself as a liberal religious organization, the purpose of which is to further respect for the individual. It viewed the Bill as an attempt to return prayer to the public schools in another guise and opposed the Bill in the legislature.

The New Jersey School Board Association is a body created by statute comprised of representatives of 611 school districts in the State. Its purpose is to promote public education in New Jersey and to assist local school boards. In the past, at the direction of a very substantial majority of the delegates from the constituent school boards, it opposed legislative efforts to mandate prayer or silent meditation in the public schools on the ground that the practice had no educational value. A small minority of the Association's delegates opposed the Association's position on the ground that prayer should be returned to the schools. By virtue of the strong stand which the delegates had taken on previous prayer and meditation bills, the Association's directors urged the legislature to defeat Bill No. 1064. The rationale offered for its adoption, the calming effect which a moment of silence would have upon students, was viewed as a pretext for a religious purpose.

Appendix B

The American Baptist Churches of New Jersey, the corrdinating body of 235 American Baptist Churches in the State, has consistently opposed the prayer and meditation bills introduced into the New Jersey legislature. It has done this on religious grounds. The mandated silence was viewed as an attempt by the State to impose something having the appearance and nature of a religious observance. At the very heart of the American Baptist faith is the tradition of religious liberty and opposition to any move by the state to intrude into religious affairs. Legislation mandating prayer, meditation and silence is conceived to be state intrusion into religious matters, the effect of which will be to cheapen and "trivialize" true religion. Significantly some American Baptist pastors and members did not agree with the position taken by their denomination's coordinating body. They did not agree because they viewed the minute of silence Bill as a useful way to bring religion into the schools.

The New Jersey Education Association is a labor organization having 117,000 members working in New Jersey's public schools. Of this number 84,000 are teachers. The organization opposed Assembly Bill 1064, perceiving it to be a back door approach to bringing prayer into the public schools.

Despite the opposition, both the Senate and the Assembly voted to override the Governor's veto of the minute of silence Bill and it became law on December 16, 1982. It was in effect only briefly before the temporary restraining order was issued in this case, but it is instructive to examine the impact which the Bill had in several school districts during the short period when it was being implemented.

Appendix B

The intervenors produced evidence of experiences in the Sayreville school system through the testimony of an elementary school teacher, Evelyn A. Swenson, the testimony of an elementary school principal, John D. Singer, and the tape of a CBS television news broadcaster showing interviews of students, a school board member and teachers after implementation of Assembly Bill 1064.

Sayreville is a community having a large number of middle income, blue collar inhabitants and a large number of first and second generation citizens of Central European and Scandinavian ancestry. It also has Black, Asian and Hispanic inhabitants.

For many years the Sayreville public schools had commenced each day with a psalm, the Lord's Payer, the salute to the flag and a patriotic song. In 1969, following the Supreme Court's school prayer decision, the Sayreville Board of Education adopted a resolution which was designed to give people an opportunity to pray. The resolution, which was moved by Board member DiPoalo provided:

> Approval was granted for a 2 minute meditation period to be instituted in our school system after the salute to the flag in the morning for any child who wants to pray, with the provision that no student be forced to pray if he is unwilling, nor deny any student the right to pray.

From that time on all the Sayreville public schools have commenced the day with opening exercises which culminated in a moment of silence. Soon after adoption of the 1969 resolution it became apparent that two minutes of silence was not feasible and by tacit agreement the period of silence was reduced in practice to 30-45 seconds.

Appendix B

Mrs. Swenson testified that at the outset she explained to students the meaning of mediation as silent, private, serious contemplation or thinking. She instructed her students to close their eyes in order that they would not distract each other. It was an opportunity to pray, but no one was required to do so. Some children sat with their hands clasped. Once or twice she noticed a child crossing himself. No parents or children ever expressed concern about the practice, and Mrs. Swenson viewed the ceremony as a helpful way to start the school day. On other occasions during the day she uses periods of silence for specific purposes. For example in science class she may ask the students to maintain silence and determine how many different sounds they can hear. Or in reading class she may ask the students to imagine a particular person or event.

In 1978 the 1969 resolution was modified by the adoption of Policy 808 specifying procedures for opening exercises. It provided for the salute to the flag as a part of each day's opening exercises and stated that, "Opening exercises may also include the singing of patriotic songs and a moment of silent meditation."

Although the language of Policy 808 differed from the 1969 resolution in that there was no reference to prayer and in that the mandated two minutes of silence was changed to a moment of silence, there was in fact no change in the Sayreville opening exercises after 1978. The effect of the 1978 enactment was simply to ratify the existing practice of reducing the length of the period of silence to 30 to 45 seconds.

The adoption of Assembly Bill 1064 required no change in Sayreville's opening exercises, except that perhaps,

literally construed, the Bill would require that the moment of silence come first in the sequence of opening events and that it last for 60 seconds.

The intervenors placed in evidence a tape of a two minute CBS interview of various persons in Sayreville concerning Sayreville's experience with its moment of silence. The interview was conducted on December 17, 1982, the day after the override of the Governor's veto. Children were shown practicing contemplation; a high school student described his experiences going back to fourth grade; a principal stated that the moment of silence created no disciplinary problems and had a salutary effect; School Board member DiPoalo, who had introduced Sayreville's 1969 meditation and prayer resolution, referred to nuclear and other crises facing today's world and opined that "people better do a little praying".

The reaction in Princeton was quite different from that in Sayreville. The school system has 2400-2500 students. Religiously the community is heterogenous. A majority of the residents are of Catholic or Protestant backgrounds. Fifteen to twenty percent of the population is Jewish. Students from forty countries are in the school system and most of the major religions of the world find adherents among the student body.

The minute of silence Bill was the subject of considerable discussion among at least the high school students. It was generally considered a form of prayer which some students opposed and some approved. One high school student, Denice Fishburne, collected 200 signatures on a petition in opposition to the Bill. Another student collected 100 signatures.

Appendix B

Princeton's Superintendent of Schools, Dr. Paul D. Houston, testified at the trial. He stated that immediately after the override of the Governor's veto he began receiving telephone calls from parents who did not wish their children to be in class when the minute of silence was observed, as they viewed the exercise as a form of enforced prayer. Principals telephoned him expressing fear that enforcing the statute would cause student disruption and stating that many students and some teachers would not observe the new law. Dr. Houston refrained from implementing the statute until he met with the school board. The board was uniformly opposed to the law, believing it to be unconstitutional as a compulsory religious observance in the public schools. By consensus it was agreed that the statute would not be implemented in the Princeton public schools pending a court determination of its validity. In Dr. Houston's opinion there is no educational justification for requiring that all students be silent at the same time. Moreover, were it to be implemented, arrangements would have to be made to excuse large numbers of students who did not wish to participate. He observed that teachers can and do provide for silent contemplation when it fits in with an educational purpose.

Mark Tulloss, an eighth grade student in Roosevelt, New Jersey, had discussed the Bill in his history class. He and most of his classmates opposed a minute of silence on the ground that it constituted prayer, but after the veto override the principal of his school gave instructions that at the start of each day every student was to observe the minute of silence by standing up, bowing his head and closing his eyes. Tulloss remained silent during these periods, but refused to bow his head or close his eyes. He

continued reading. The reaction of his classmates to the exercise was that it was "boring", "stupid".

Paramus is a community of 30,000 people, the Jewish, Protestant and Catholic faiths each being equally represented among the population. Dr. Paul Shelly, Superintendent of the Paramus school system, testified that students and teachers generally perceived the minute of silence Bill as an effort to circumvent the Supreme Court decisions and to reintroduce prayer into the schools. The State Board of Education sent no guidelines to the various school districts after the Bill became effective; it simply distributed a copy of the Bill. There were objections to implementing the Bill in Paramus, and Dr. Shelly simply informed teachers that the law had been passed, without elaborating upon how it should be implemented.

Plaintiff Cary Butler, a 17 year old student in the Hillsborough Township High School did not wish to participate in the moment of silence when the entire school was directed by the prinicpal to sit for the minute of silence and be perfectly quiet and still. It was a matter Cary had discussed at home and he and his family concluded that the enforced minute of silence violated their beliefs. He asked his teacher to leave, and the teacher sent him to the school office for a determination. In the hall another teacher directed him to stand still and be quiet, which he refused to do on the ground that it would be enforced prayer. Cary was charged with insubordination and suspended, but shortly he was permitted to return to classes and leave his homeroom during the minute of silence. This dispensation was not granted to other students, the principal preferring to handle requests on a case-by-case basis.

Appendix B

Plaintiff Gary Drew and his wife are Roman Catholics who have six year old and nine year old daughters in the Old Bridge Township public schools. They object to use of the minute of silence in the schools because they believe religious training and observance should be taught in the home and the church. They do not wish to have their young and impressionable children subjected to whatever practice teachers may employ in implementing what they view as an essentially religious observance. They did not instruct their children to leave their classrooms when the minute of silence was observed, because they were concerned that it would unduly embarrass them.

The pain that such a move would cause a young child is illustrated by the circumstances in which Rita Rothenberg and her family found themselves. Mr. and Mrs. Rothenberg asked their young son Joshua to decline to participate in the minute of silence on religious grounds. The thought of being separated from the other children so upset Joshua that his parents did not persist in their request that he leave the room during the minute of silence.

Plaintiff Jeffrey May is a high school teacher in the Edison school system. He is an agnostic and views the minute of silence as a form of prayer in which he cannot in good conscience participate.

On December 22, 1982 he and all other faculty members received a memorandum from the principal of his high school. The memorandum directed all faculty members and students to participate in a minute of silence as directed by the State Legislature. Mr. May informed his principal that he could not and would not participate because he views the law to be unconstitutional and because it violated his conscience and personal philosophical beliefs.

He was nevertheless directed to take part. He refused to do so and was threatened with disciplinary action.

The foregoing represents types of reactions in the public schools in New Jersey after Bill 1064 became effective.

Dr. Calvin Thompson, a psychologist, testified for the intervenors. He had conducted a study in the Las Cruces, New Mexico Public School District of the public perception of the moment of silence law in effect in that District. The District has 14,000 school children. Its population is largely middle class with approximately 50% of the population being of Hispanic origin and approximately 50% being "Anglo". There is a small number of Black and Indian inhabitants. The population is predominantly Christian—Catholic and Protestant—with a lesser number of Jewish inhabitants.

Las Cruces' moment of silence law is described in *Duffy* v. *Las Cruces Pub. Schools,* 557 F. Sup. 1013 (D. N.M. 1983). Dr. Thompson studied the effect of the practice by televising a number of classrooms before, during and after the moment of silence, by watching the period of silence and by conducting structured interviews with students. On the basis of his study Dr. Thompson concluded that most persons viewed the moment of silence as simply silence and not as prayer. He concluded that it served as a transitional tool separating outside activities from school work and that it was a moment which could be used for meditation or prayer. Some of the students who were interviewed stated that they used the moment for prayer. In any given observation he made, from 0 to 20% of the students assumed positions which could be inter-

preted as having the probability of being a religious act.[3] Dr. Thompson was of the opinion that the public perception of the moment of silence in New Jersey would be similar to the perception in New Mexico. Dr. Thompson provided interesting data, but I think care must be exercised in generalizing on the basis of it. There are major differences between New Jersey and New Mexico. More important, there are major differences between the many communities in New Jersey. As the other evidence in the case clearly demonstrates, attitudes toward the minute of silence differ greatly from one New Jersey community to another. Las Cruces may reflect attitudes in some of them but certainly not in all or perhaps even in very many of them.

Having described the genesis of Bill 1064 and the reaction to its becoming effective, it is necessary to examine briefly its religious and educational implications.

Plaintiffs offered the testimony of Dr. Langdon Gilkey, professor of theology at the University of Chicago Divinity School and a Baptist minister. Dr. Gilkey teaches historical theology and the relationship of theological views to contemporary culture. He offered a definition of religion which is serviceable for the purpose of this case and can be used to analyze the facts established here. It is a definition which, I believe, is in accord with the develop-

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[3] When the moment of silence was implemented in Las Cruces the school children were given notes to take home to their parents so that the family could discuss what the students would do during the ent moment. Dr. Thompson's four children exhibited a diversity of reactions. His teen-age son believed the statute violated his constitutional rights. One daughter wished to use the moment for prayer. Another daugher asked if she could chant. A third daughter did not do much with the moment.

ing concept of religion reflected in more recent Supreme Court decisions, *see* Judge Adams' discussion of the definition of religion for constitutional purposes in his concurring opinion in *Malnak* v. *Yogi,* 592 F.2d 197, 200-215 (3d Cir. 1979).

All religions, according to Dr. Gilkey, have three components: (i) each embodies a view of ultimate reality—especially as it concerns the human predicament and the resolution of the difficulties human beings confront as they proceed through life; (ii) each religion prescribes a way of life, which constitutes a response to the ultimate reality perceived by that religion; and (iii) each religion with its view of ultimate reality and its way of life is embodied in an historical community of faith which links the past, the present and the future.

The second element of religion—the way of life which responds to the perception of ultimate reality—includes such practices as participation in the sacraments and prayer. This is the point at which Assembly Bill 1064 is charged with impinging upon or furthering religion.

In the Christian, Jewish and Islamic religions God is viewed as the ultimate reality and prayer is usually central to the way of life which responds to that ultimate reality. In other religions, such as Buddhism, God may not be the ultimate reality and the response may be meditation or other observances rather than prayer.

Even where a principal component of a religion's way of life is prayer, the forms of prayer may differ widely, being conditioned by historical and cultural traditions, by time and by place. In the traditional American culture silence, bowing one's head and clasping one's hands is

associated with prayer. This reflects the development of Protestantism, Reform Judaism and Catholicism. Historically, however, Catholics kneeled and Jews raised their hands. Members of the Islamic faith may kneel on prayer rugs, face east and call out loud upon Allah. For Quakers silence itself is prayer. For others prayer must be vocal. With the increasing cultural and religious diversity in the United States, with traditional western religions being supplemented by adherents of and converts to eastern religions, diversity in the forms of prayer has proliferated.

What the minute of silence Bill has done is to mandate that all students assume the posture of one traditional form of prayer. While this may provide the opportunity for many perons to engage in their kind of prayer, the enforcement of silence either in a seated or standing position prevents others from engaging in their kinds of prayer.

Like the Rev. George D. Younger, who testified as to the views of the American Baptist Churches of New Jersey, Dr. Gilkey was of the opinion that legislative acts such as Bill 1064 which may lead to objective prayer will have the effect of causing a rejection of genuine religion in all of its three components. That is to say, the intervention of the state is counterproductive—enforcement of religious observances will induce cynicism and resistance on the part of any healthy person and the rejection of that which the state is seeking to instill.

Intervenors maintain that Bill 1064 has a secular purpose, namely, providing a period of transition from the many concerns of the students outside of school to the work of the school. In support of this thesis the intervenors offered the testimony of Dr. Adam Scrupski, an

associate professor at Rutgers Graduate School of Education. He was of the opinion that the minute of silence can serve a useful pedagogical function as a supplement to or as an opening exercise forming the boundary between school and not-school. Silence connotes seriousness and solemnity, as in a courtroom, library or place of worship, and having a teacher administer the period of silence serves to accentuate his or her role in the educational process. There is a need for a boundary, according to Dr. Scrupski, and a ritual such as a moment of silence serves to provide the boundary. He viewed the salute to the flag as a less effective boundary than it once was, although it can still serve that purpose.

The experience in Sayreville's schools certainly suggests that in combination with the flag salute and a song a brief period of silence serves a transition purpose.

The circumstances of Dr. Scrupski's retention as the intervenor's expert casts some doubt on the proposition that the State legislators enacted Bill 1064 in a search for the best method of effecting a transition from non-school to school activities. In the spring of 1983, long after the temporary restraining order was entered, Dr. Scrupski happened to discuss the Bill with a friend who worked on the staff of one of the Legislature's Committees on Education. The staff member asked him if there might be a secular purpose for the law. In the words of Dr. Scrupski, "He was interested in knowing if I thought there was a secular consequence, a good reason, so to speak" (Tr. at 546). Dr. Scrupski found a secular consequence and was retained to testify concerning it.

I will not summarize the testimony of plaintiffs' experts, Dr. Peter J. Kuriloff, associate professor of education

at the University of Pennsylvania and Dr. Stanley L. Rosner, a professor at the College of Education at Temple University. Their testimony and that of the other witnesses of both parties convinces me beyond any doubt whatsoever that one minute of silence as a transitional device for all grade levels in all schools for all kinds and conditions of students has little educational justification. Frequently the bustle of the playground cannot be transformed into serious school work by a requirement to sit still; rather some alternative action must be engaged in to transfer the students' attention to the work of the school. For young children a minute of silence may be an eternity, while many older students could handle it with ease. For hyperactive or handicapped children a minute of silence may be an impossibility. There is no evidence that any school in New Jersey was having any difficulty effecting a transition from non-school to school. Even in Sayreville which incorporated a period of silence at the end of its active opening exercises, the authorities found that they could not handle more than 30 to 40 seconds of mandated silence and simply disregarded the Board of Education resolution which mandated a longer period.

It is unclear whether Bill 1064 requires that every student remain present during the minute of silence or whether it simply requires that every student be given an opportunity to observe a minute of silence with the right of those who do not wish to participate to absent themselves. If the former interpretation is adopted, it is quite clear from the Princeton experience that significant numbers of students and teachers will refuse to observe silence on religious or other grounds based on conscience. If the latter interpretation is adopted, varying numbers of students and teachers will elect to stay away from the

observance. In either situation the exercise will have only marginal utility as a transitional device for all students.

Having set forth the evidence in some detail, it is possible to draw from it certain generalized factual findings:[4]

1. From a religous perspective New Jersey's population is diverse. It includes persons holding deep religious convictions; it includes persons who are indifferent to religion; it includes persons who, as a matter of conviction, belong to no organized religious body and engage in no religious observances.

2. The very substantial portion of New Jersey's population which considers itself religious exhibits great diversity as to all three aspects of religion, that is to say, as to views of the nature of ultimate reality, as to the outward practices observed to express views of ultimate reality, and as to the particular religious bodies to which adherence is given.

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[4] Numerous newspaper articles and similar published materials were offered and received in evidence. During the pretrial stages of the case it seemed that perhaps such sources would be the best evidence of the purpose and effect of the legislation under consideration. However, the testimony and other evidence produced by both sides at the trial proved to be far more helpful in this regard. The articles are clearly evidence of the purpose of the legislation and to some extent are supportive of testimony concerning the public's perception of the Bill 1064. However the articles do not form a basis for my findings as to the public's perception. Consequently it is unnecessary to determine the extent to which public perceptions can be guaged from newspaper articles (*see* on this subject the testimony of Professor Jerome L. Aumente of the Rutgers Journalism Institute).

Appendix B

3. Prayer, which is a common practice of many different religious bodies, takes many forms. Each form of prayer can be associated with particular views of ultimate reality and with particular religious bodies.

4. A short period of group silence at the commencement of the day or at the commencement of an undertaking constitutes one of the traditional forms of prayer of major religious bodies in New Jersey.[5]

5. The purpose of Bill 1064 was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer. This conclusion is drawn from the facts that:

a. Until the early 1960's when the United States Supreme Court held that school-sponsored prayer and Bible reading in public schools are unconstitutional, the New Jersey public schools traditionally included prayer and Bible reading as part of their opening exercises.

b. There was and is substantial public sentiment that prayer should be a part of opening exercises.

c. In response to this public sentiment and, in some cases, by reason of personal conviction, many New Jersey legislators introduced one bill after another in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling.

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[5] The evidence produced at the trial of this case suggests that I spoke prematurely and over-simplified the situation when I concluded at the time plaintiffs applied for a temporary restraining order that "the statute on its face is neutral" and "does not purport by its terms to mandate prayer."

Appendix B

d. Assembly Bill 1064 prescribing a minute of silence is but the most recent of such bills motivated by these sentiments.

e. The driving force behind the Bill came from those who deeply and sincerely believed that an opportunity for prayer in the public schools at the beginning of each day should be mandated.

f. Similarly one driving force in opposition to the Bill came from religious persons who perceived the minute of silence as a State prescribed religious observance violating their deeply and sincerely held belief that the State cannot involve itself in religious matters.

g. Other opposition to the Bill came from non-religious persons who perceived the minute of silence as an enforced religious observance.

6. The purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill. This conclusion is drawn from the facts that:

a. There is no evidence that any school lacked an effective means of making the transition from non-school to school through such devices as the salute to the flag, a song, a period of announcements and taking attendance and the like.

b. The agencies having the most knowledge and experience with educational matters, namely the school boards and teacher organizations throughout the State, overwhelmingly opposed the Bill on the grounds that it had no educational value.

Appendix B

c. While the minute of silence might serve as a transition device for some students of more mature years, it could not serve as such a device for younger students, certain handicapped students and others.

d. The attempt to develop rational support for the thesis that a minute of silence served a transitional purpose commenced after this law suit was underway rather than before the Bill was adopted.

7. As implemented the Bill requires all students to assume a posture identified as the posture of prayer of certain religious groups.

8. Although the Bill is designed to give persons an opportunity to pray, in fact it only gives an opportunity to pray to those whose prayers can be performed in the prescribed posture. Others whose prayers require action and/or sound are precluded from engaging in prayer during the minute of silence.

9. The experiences of various schools during the weeks when the minute of silence was enforced suggests that some students will use the minute of silence to pray; some will use it to engage in thoughtful meditation; some will tolerate it though considering it boring and stupid; some who believe it violates their religious convictions will nevertheless submit to it, not wishing to risk public ridicule; some who believe it violates their religious convictions will either refuse to observe it or will absent themselves from the place where others are observing it.

Appendix B

The Law

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Fourteenth Amendment makes the First Amendment binding on the states. *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

Bill 1064 requires that public school principals and teachers "shall permit students to observe 1 minute of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection." "Contemplation" has been defined in Webster's as "meditation on spiritual things" and "introspection" has been defined as "looking into or within, as one's own mind" or "inspecting, as one's own thoughts or feelings." Very simply, the issue posed in this case is whether, Bill 1064 constitutes a law respecting an establishment of religion or prohibiting the free exercise thereof. I conclude that Bill 1064 does constitute such a law.[6]

The test, stated negatively, is that "[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with

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[6] Two recent law review articles have surveyed the law and analyzed the constitutional issues raised by moment or minute of silence laws in general. Note: Moments of Silence, 96 Harv. L. Rev. 1874 (1983); Note: Daily Moments of Silence in Public Schools, 58 N.Y.U. L. Rev. 364 (1983). Another recent law review article has analyzed New Jersey's minute of silence law. Drakeman, Prayer in the School, etc., 35 Rut. L. Rev. 341 (1983).

religion." *Committee for Public Education* v. *Regan,* 444 U.S. 646 (1980); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Gilfillan* v. *City of Philadelphia,* 637 F.2d 924 (3d Cir. 1980); *Malnak* v. *Yogi, supra.* The statute under review does not pass muster under any of these criteria.

As found above, the purpose of Bill 1064 is religious not secular. Intervenors urge that "the unambiguous language of New Jersey's moment of silence law evidences a legislative interest to promote a secular purpose in a manner that is constitutionally neutral to religion."(Intervenors' Brief at 11, 12). Unless one examines the statute in a total vacuum, this conclusion is without rational basis. All the evidence points to the religious intent of this enactment—the period of more than a decade during which the New Jersey legislature sought to evade *Engle* and *Abington Township* in order to reintroduce a mandatory time for prayer in the public schools; the debate upon the Bill which was in terms of public prayer and State involvement in religion; the time and manner in which the minute of silence was mandated, following the form and posture of school prayer which was outlawed in the early 1960's.

This obvious attempt to cross the forbidden line becomes all the more apparent in light of the pretexual nature of the secular purpose advanced in this case. True, intervenors' witnesses testified that the Bill can serve as a useful boundary between non-school activities and school work. However, only the utterly naive would conclude that the Bill's advocates were fighting passionately for establishment for such a boundry. It is abundantly clear that once the Government's veto has been overriden and

litigation commenced, Bill 1064 became a statute in search of a secular purpose.

The intervenors urge, quite correctly, that "constitutional analysis of legislative purpose does not involve a judicial inquiry into supposed illicit legislative motive." (Intervenors' Brief at 26). There is a distinction, I believe, between the motives and purposes of individual legislators and an institutional legislative purpose. Legislators may have the purest of personal motives and produce unconstitutional legislation, and contrariwise individual legislators with wrongful motives may vote for a bill and produce legislation which is both beneficient and constitutional. This is illustrated by *United States* v. *O'Brien,* 391 U.S. 367 (1968), which upheld the provision of the Universal Military Training and Service Act of 1948 making it an offense to willfully and knowingly mutilate, destroy and change by burning a registration certificate. In light of the overwhelming obvious and important secular purpose of the Act, the Supreme Court upheld the constitutionality of this provision even though an incidental effect may have been to circumscribe a person's ability to express his views about the Act by burning his draft registration card. The Court noted that "this Court will not strike down *an otherwise constitutional statute* on the basis of an alleged illicit legislative motive". 391 U.S. at 383 (emphasis added). It declined, therefore, to give significance to the statements of one Senator and two House members as probative of the claim that the purpose of the provision at issue was to stifle free speech rather than to advance a secular purpose.

The present case is a far cry from *O'Brien.* Here there is no overwhelming secular purpose. Both the history of

this kind of legislation and the circumstances of the adoption of this particular Bill point inescapably to an essentially religious purpose. The statements of the legislators in committee, on the floor and to the public as disclosed by the evidence in this case are consistent with and confirmatory of an institutional purpose to accomplish something the Constitution forbids.

Intervenors point to the language of Justice Brennan's concurring opinion in *Abington School District* v. *Schempp, supra,* as support for the proposition that a moment of silence is a secular device:

> The second justification [of prayer and Bible reading] assumes that religious exercises at the start of the school day may directly serve solely secular ends—for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline.
>
> . . .
>
> I have previously suggested that Torcaso and the Sunday Law Cases forbid the use of religious means to achieve secular ends where nonreligious means will suffice. That principle is readily applied to these cases. It has not been shown that readings from speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, *or even the observance of a moment of reverent silence at the opening of class,* may not adequately serve the secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper

> degree of separation between the spheres of religion and government.

374 U.S. at 280, 281 (emphasis added).

The question of the purpose and effect of a minute or moment of silence was not at issue in *Abington*. That question is at issue in the present case, and I think a showing has been made that New Jersey's minute of silence does not jeopardize the religious liberties of members of the community and breaches the proper degree of separation between the spheres of religion and government.

The conclusion I have reached is consistent with the most recent federal district court cases passing on the constitutionality of moment of silence laws. *Duffy* v. *Las Cruces Public Schools, supra; Beck* v. *McElrath,* 584 F. Supp. 1161 (M.D. Tenn. 1982); *see also Opinion of the Justices to the House, etc.,* 387 Mass. 1201, 440 N.E.2d 1159 (Sup. Jud. Ct. 1982); *contra, Gaines* v. *Anderson,* 421 F. Supp. 337 (D. Mass. 1976). Intervenors argue that New Jersey's statute is inherently different from the statutes under review in those cases because there "the plain language of the statute, which incorporated the word prayer, made apparent their predominantly religious purpose." (Intervenors' Brief p. 14). Given the history and circumstances of the enactment of Bill 1064, I think it is clear that the omission of the word "prayer" is a cosmetic change only, having no substantial effect. Illustrative of the lack of any practical effect is Sayreville's experience. There the town's original enactment provided for a two minute meditation period in order that the students have an opportunity to pray. The subsequent change in language to omit the reference to praying was not intended

to result and did not result in any change in what was actually being done in the schools.

Nor do I believe that the recent Supreme Court case of *Marsh* v. *Chambers,* 51 U.S.L.W. 5162 (Jul. 5, 1983) was intended to modify the law governing State sponsored prayer in public schools. There the Court held that the practice of the Nebraska Legislature of opening each legislative day with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. The Court noted an unbroken history of more than 200 years during which legislators opened their sessions with a prayer but emphasized that in *Marsh* "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' ". Slip Op. at 8, 9. This latter comment, I believe, suggests a clear intent to distinguish legislative prayer by adults which, like the opening of court, is primarily of a traditional ceremonial nature from mandated prayer by school children.

Thus I conclude that Bill 1064 does not have a bona fide secular purpose and, in fact, has a religious purpose.

Turning to the second prong of the test of validity, I conclude that the Bill both advances and inhibits religion.

It advances the religion of some persons by mandating a period when all students and teachers must assume the traditional posture of prayer of some religious groups and during which those who pray in that manner can do so. This is exactly what happened during the time when Bill 1064 was in effect. In Sayreville, continuing past practice, students were instructed to sit, close their eyes and observe silence. In Hillsborough Township children

were directed to sit and be quiet and still. In Roosevelt Junior High School students were instructed to stand up, bow their heads, close their eyes and observe silence.

Thus the State has injected itself into religious matters by designating a time and place when children and teachers may pray if they do so in a particular manner and by mandating conduct by all other children and teachers so that the prayers may proceed uninterrupted in their presence.

While this form of legislation advances the religion of some, it inhibits the religion of others in at least two ways.

First, there are those whose religious practices include silent prayer and meditation but who, as an article of faith, believe that the State should have no part in religious matters. For them mandated prayer is no longer prayer. It is their conviction that if the State requires any form of religious observance the observance is drained of its substance, loses its power and becomes but an empty shell. *Cf.,* Tillich, *Dynamics of Faith,* Ch. III, Symbols of Faith (Harper & Row 1958). Thus the State, seeking to further religion by mandating certain religious observances, in fact weakens religion by draining vitality from these observances.

Examples of this emasculating process can be seen in the cases. When a legislature routinely opens its sessions with prayer, when a court commences each day with "God save the United States and this honorable court", the courts have recognized that the effect is not to establish religion. Rather, the words which are spoken may represent a solemn and traditional ceremony serving a valuable civil function. They are no longer the words of a believer

responding to his views of ultimate reality; they are, therefore, no longer prayer either in a religious or constitutional sense. Certain of those who oppose Bill 1064 on religious grounds seek to spare their mode of prayer from such a fate.

Second, by mandating a minute of silence which permits some persons to engage in prayer, Bill 1064 prevents other persons from engaging in their kind of prayer. Justice Brennan noted on his concurring opinion in *Abington*:

> . . . our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

The religious diversity of which Justice Brennan spoke in 1963 is far more pronounced now. Thus religious practices and the concepts of ultimate reality to which these practices point vary ever more widely. While once the prayers of most religious people could be carried on in an environment of silence, now that is no longer the case. The prayers of some persons require movement and sound. Bill 1064, therefore, mandates an environment which allows some to pray but which prevents others from engaging in their form of prayer.

Appendix B

Finally there are those who profess no religion and to whom any form of prayer is offensive. Bill 1064 requires these persons to assume a posture suggestive of particular forms of prayer which are responsive to particular beliefs about ultimate reality. Understandably those who do not share those beliefs do not wish to be required to maintain a pose which suggests that they do. Children holding these views, as illustrated in the present case, are forced either to endure an exercise which runs counter to their beliefs or to face public opprobrium or ridicule by asking to be excused each day.

There is nothing in the language or reasoning of the Supreme Court's opinion in *Mueller* v. *Allen*, 51 U.S.L.W. 5050 (June 29, 1983) which affects the conclusion that the effect of Bill 1064 renders it unconstitutional. There the Court upheld a Minnesota statute which permitted taxpayers in computing their state income tax to deduct certain expenses incurred for the education of their children. This result was reached even though most such expenses involved payments on account of students attending private schools and even though it was established that 95% of such students attended sectarian schools. Applying the three point test, the Court concluded the tax deduction satisfied the primary effect inquiry. However, *Mueller* is of very limited utility in the present case. It is but the most recent in a long line of cases dealing with the question of the extent to which state legislation may, directly or indirectly, aid sectarian schools. The facts of those cases and the problems of church and state relations which they raise are quite different from the facts and problems raised by the school prayer cases.

Bill 1064 impermissibly advances the religion of some and inhibits the religion of others.

Appendix B

The third inquiry is whether Bill 1064 fosters an excessive government entanglement with religion. Implementation of the Bill would not involve the State in the kind of continued and pervasive monitoring of sectarian activities which was condemned in *Lemon* v. *Kurtzman, supra.* It would, however, tend to promote divisiveness among and between religious groups, another form of entanglement. *Gilfillan* v. *City of Philadelphia, supra,* at 932. A required minute of silence would put children and parents who believed in prayer in the public schools against children and parents who do not. The events in Princeton are illustrative of this consequence. There the school administrators were threatened with disruptive behavior by students who believed the minute of silence constituted enforced prayer contrary to their own convictions. Elsewhere the opposition did not take the form of threatened disruption, but children and parents were forced to decide whether the children should submit to an exercise which violated their beliefs or whether they should separate themselves from their peers.

With no secular purpose being served, this degree of entanglement causes Bill 1064 to fail the third prong of the test of validity.

For the foregoing reasons Bill 1064 violates the First Amendment and plaintiffs are entitled to a judgment granting the declaratory and injunctive relief they seek.[7]

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[7] Helpful amicus briefs were filed on behalf of the following organizations: New Jersey Education Association (by Zazzali, Zazzali & Kroll, James R. Zazzali, Esq. and Kenneth I. Nowak, Esq., on the brief); New Jersey Council of Churches (by Donald

(Footnote continued on following page)

Appendix B

Under 42 U.S.C. § 1988 a prevailing party may in appropriate circumstances be entitled to recover attorneys fees. In the unusual circumstances of this case I do not believe that such an award is warranted.

The named defendants did not contest the action on the merits. They were not responsible for enactment of the legislation under review. There is no reason why they should be required to pay plaintiffs' attorneys fees.

The intervenors did oppose plaintiffs on the merits. However, even though they did not prevail, their participation in the case served a valuable public purpose. Without their participation the facts and the law would not have been developed adequately. In a difficult case such as this in which important public interests are involved, it was essential that the facts be developed and the law fully presented. Since intervenors' role in this case contributed significantly

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(Footnote continued from preceding page)

L. Drakeman, Esq.) Anti-Defamation League of B'nai B'rith, American Jewish Committee, Essex County Board of Rabbis, Jewish Federation of Central New Jersey, Jewish Federation of Southern New Jersey, New Jersey Assocation of Reform Rabbis, New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations, and United Synagogues of New Jersey (Howard T. Rosen, Esq.; Of Counsel: Justin J. Finger, Jeffrey P. Sinensky, Ruti G. Teitel, Samuel Rabinove, Andrea S. Klausner, James H. Laskey and Alan Goldstein); American Jewish Congress, Jewish Community Federation of Metropolian New Jersey, Jewish Federation of North Jersey, Jewish Federation of Raritan Valley, Bayonne Jewish Community Council, and National Council of Jewish Women (by Stern, Steiger, Croland & Bornstein, P.A.; Of Counsel: Nathan Z. Dershowitz, Esq. and Marc D. Stern, Esq.; On the brief: Kennth S. Goldrich, Esq., Marc D. Stern, Esq. and Jay Rubenstein, Esq.).

in that regard it would be inappropriate to charge them with attorneys fees.

For the same reason no costs will be allowed to any party.

Plaintiffs' attorneys are requested to prepare a form of order implementing this opinion.

DICKINSON R. DEBEVOISE
U.S.D.J.

Dated: October 24, 1983

APPENDIX C

Order of the United States District Court for the District of New Jersey

(Filed—November 10, 1983)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 83-89

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually,

Plaintiffs,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants.

and

Appendix C

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate and the NEW JERSEY SENATE,

Defendants-Intervenors.

THIS MATTER having been tried before the Court, non-jury, upon plaintiffs' application for Declaratory and Injunctive Relief brought pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Sections 2201 and 2202, seeking to have declared unconstitutional New Jersey Public Law 1982, Ch. 205, and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law as set forth in its Opinion dated October 24, 1983;

IT IS on this 10th day of November, 1983 ORDERED, ADJUDGED and DECREED that New Jersey P.L. 1982, Ch. 205 is unconstitutional on its face and as applied, and that judgment is granted in favor of the plaintiffs herein.

It is FURTHER ORDERED that plaintiffs are not entitled to recover attorney's fees or costs pursuant to 42 U.S.C. Section 1988, for the reasons set forth in the Court's Opinion dated October 24, 1983.

DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX D

Judgment of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK SCHORSKE, an infant, and BONNIE SHORKSE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants,

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate; the NEW JERSEY SENATE,

Defendant Intervenors,

Appendix D

NEW JEREY COUNCIL OF CHURCES,
NEW JERSEY EDUCATION ASSOCIATION,

Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate, the New Jersey Senate, Defendant Intervenors,

Appellants.

(D.C. Civil No. 83-0089)

On Appeal From The United States District Court
For The District of New Jersey—Newark

Present: GIBBONS and BECKER, *Circuit Judges* and KATZ, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel October 26, 1984, and reargued August 13, 1985.

On consideration where of, it is now here ordered and adjudged by the Court that the judgments of the said District Court entered November 15, 1983, appealed at No. 83-5890 and the order entered by the said District

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix D

Court entered January 30, 1984, appealed at No. 84-5126 be and the same is hereby affirmed insofar as the appeal at No. 83-5890. The appeal at 84-5126 is dismissed. Costs taxed against appellants.

ATTEST:

SALLY MRVOS
Clerk

December 24, 1985

Certified as a true copy and issued in lieu
of a formal mandate on January 15, 1986.

Test:

BETTY J. ROBINSON
Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX E

Notice of Appeal to the Supreme Court of the United States and Proof of Service

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, Individually, et als.,

Plaintiffs-Appellees,

v.

SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION, et als.,

Defendants,

ALAN J. KARCHER as Speaker of the New Jersey GENERAL ASSEMBLY, et als.,

Defendants-Intervenors-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alan J. Karcher, as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, as President of

the New Jersey Senate and the New Jersey Senate, defendants-intervenors-appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third Circuit entered in this action on December 24, 1985, affirming the judgment entered in this action by the United States District Court for the District of New Jersey.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

HANNOCH WEISMAN, P.C.
Attorneys for Defendants-Intervenors-Appellants, Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, as President of the New Jersey Senate and the New Jersey Senate
By: WILLIAM W. ROBERTSON
A Member of the Firm

DATED: March 19, 1986

Appendix E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, Individually, et als.,

Plaintiffs-Appellees,

v.

SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION, et als.,

Defendants,

ALAN J. KARCHER as Speaker of the New Jersey GENERAL ASSEMBLY, et als.,

Defendants-Intervenors-Appellants.

PROOF OF SERVICE

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

I, JEAN L. BELLINO, of full age, being duly sworn, according to law, upon my oath, depose and say:

1. I am employed by Hannoch Weisman, P.C., attorneys for appellants in this cause.

Appendix E

2. I did on Wednesday, March 19, 1986, cause to be hand delivered an original and one copy of a Notice of Appeal To The Supreme Court of the United States, together with an original and one copy of proof of service to Sally Mrvos, Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania.

3. I did on Wednesday, March 19, 1986, serve, by first class mail, two copies of a Notice of Appeal To The Supreme Court Of The United States, together with a copy of a proof of service upon the following:

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Attorneys for Appellees

Alfred A. Ramey, Jr.
Deputy Attorney General
Department of Law & Public Safety
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CN 11L, Justice Complex
Trenton, New Jersey 08625

JEAN L. BELLINO

NOTARIZED

APPENDIX F

Assembly Bill No. 1064

ASSEMBLY, No. 1064

STATE OF NEW JERSEY

INTRODUCED MARCH 8, 1982

By Assemblymen ZANGARI, PATERNITI, HERMAN, Assemblywoman PERUN, Assemblymen DEVERIN, OTLOWSKI, PELLY, HENDRICKSON, COWAN, JANISZEWSKI, NAPLES, Assemblywoman COSTA, Assemblymen PELLECCHIA, GIRGENTI, RILEY, MARSELLA, DORIA, WATSON, Assemblywoman GARVIN, Assemblymen BOCCHINI, PATERO, DOYLE, KARCHER, MATTHEWS, CHARLES, BRYANT, PANKOK, VAN WAGNER, THOMPSON, VISOTCKY, BROWN, JACKMAN, FLYNN, BENNETT, T. GALLO, SHUSTED, CHINNICI, ROCCO, SCHUBER, KOSCO, MARKERT, Assemblywoman WRIGHT, Assemblymen FRANKS, ROD, MUZIANI, MEYER, HAINES, WOLF, KAVANAUGH, SMITH, PALAIA, MILLER, KELLY, GORMLEY and LITTELL

Referred to Committee on Education

AN ACT to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.

Appendix F

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

2. This act shall take effect immediately.

STATEMENT

This bill allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student.

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1551

In The

Supreme Court of the United States

October Term, 1985

ALAN J. KARCHER, et al.
Appellants,

vs.

JEFFREY, MAY, individually, et al.
Appellees.

On Appeal from the United States Court of Appeals For the Third Circuit

MOTION TO DISMISS OR AFFIRM

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Liberties Union
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Richard M. Altman *
Anne P. McHugh *
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Attorneys for Appellees

* Counsel of Record
**On the Brief

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 (215) 928-1900

QUESTIONS PRESENTED

1. Whether Alan J. Karcher and/or Carmen A. Orechio, in their capacities as members of a prior Legislature, retain standing to appeal the judgment of the United States Court of Appeals for the Third Circuit when the only party with standing to prosecute this appeal, the current 202nd Legislature, has directed that the appeal be withdrawn?

2. Whether the Court of Appeals correctly or properly affirmed that the New Jersey Moment of Silence Law violates the Establishment Clause of the First Amendment when incontrovertible facts, including the plain language of the statute, its legislative history and the historical background from which it emanated, all demonstrate that the purpose of the statute was to promote religion in the public schools?

3. Whether the Court of Appeals properly applied the "clearly erroneous" standard of review dictated by Fed. R. Civ. P. 52(a) in upholding the District Court's factual finding of no secular purpose and in declaring unconstitutional New Jersey's Moment of Silence Law?

PARTIES TO THE PROCEEDING

Appellants: Alan Karcher and Carmen Orechio intervened as party defendants in this action solely in their representa- tive capacities as Speaker of the New Jersey General Assembly and President of the New Jersey Senate, respectively. At the time that they intervened as party defendants, they were members of the 200th Legislature. As of that date, Messrs. Karcher and Orechio continued as Speaker of the General Assembly and President of the Senate for the 201st Legislature.

On January 14, 1986 at 12:00 noon the 201st Legislature adjourned and the 202nd Legislature convened. Messrs. Karcher and Orechio no longer held their posts as leaders of their respective houses. The new Legislature elected, by majority, Charles Hardwick to represent them as Speaker of the General Assembly and John Russo to represent them as President of the New Jersey Senate.

The appeal now before this Court had been authorized by the prior Legisla- ture, the 201st. However, by letters dated April 21, 1986 and April 29, 1986 from the Honorable Charles Hardwick and from Leon Sokol, counsel to the Democratic majority in the Senate speaking on behalf of their respective bodies, directed that the appeal be withdrawn. Both the New Jersey Senate and the General Assembly determined that the Legislature no longer desired to prosecute this appeal. These sentiments were communicated to the Clerk of the Supreme Court of the United States by

William Robertson, Esquire who apparently takes the position that he now represents Messrs. Karcher and Orechio individually.

Saul Cooperman, the Commissioner of the New Jersey Department of Education, the New Jersey Department of Education, the Edison Township Board of Education and the Old Bridge Township Board of Education were all named as defendants in the original complaint, but took no active role in the proceedings before either the District Court or the Court of Appeals.

Appellees: In addition to Jeffrey May, individually, Jean Ross, as natural parent of Damon Ross, an infant, and Jean Ross, individually; Bonnie Schorske, as natural parent of Mark Tulloss, an infant, and Bonnie Schorske, individually; Brenda Butler, individually, and Gary Drew, individually, were appellees in the court of appeals.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	vii
Motion to Dismiss or Affirm	1
A. Because the only party with standing to bring the current appeal has determined to withdraw the appeal, there is no case or controversy and the appeal must be dismissed for want of jurisdiction	2
B. Because the district court adhered to Establishment Clause jurisprudence, and because two courts have determined, based on an extensive trial record, that New Jersey's Moment of Silence Law lacked any real secular purpose, the questions presented are so unsubstantial as not to need further argument	18
(1) Content of Legislative proceedings and legislators' statements	28
(2) Experts' testimony about pedagogical value	33
(3) Prior legislative measures relating to silence or meditation	35

TABLE OF CONTENTS

	Page
C. A judicial finding of no secular purpose is a factual finding subject to the clearly erroneous standard of review fixed by Rule 52(a), and the jurisprudence of Bose Corporation v. Consumers Union does not dictate otherwise ..	41
Conclusion	54
APPENDIX:	
A. Hannoch Weissman letter of May 6, 1986 to Clerk of the Supreme Court of the United States	1a
B. Letter from Chuck Hardwick, Speaker of the New Jersey General Assembly	4a
C. Letter from Leon Sokol on behalf of John Russo, President of the Senate	5a
D. Letter from Alan J. Karcher to Appellant Attorneys	6a
E. Letter from Chuck Hardwick to Jeffrey Fogel	8a
F. Statement by Senate President John F. Russo and Assembly Speaker Chuck Hardwick concerning the Moment of Silence Case	10a

TABLE OF CONTENTS

		Page
G.	Transcript of the January 18, 1983 hearing before the Honorable Dickinson R. Debevoise, U.S.D.J. for the District of New Jersey	11a
H.	Affidavit of Service	28a

TABLE OF AUTHORITIES

Cases Cited

	Page
Anderson v. Bessemer City, 105 S. Ct. 1504 (1985)	49, 52, 53
Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)	27, 30
Bartimo v. Horsemen's Benevolent Ass'n, 771 F.2d 894 (5th Cir. 1985)	43
Bender v. Williamsport Area School District, 106 S.Ct. 1326 (1986)	7, 10, 11, 12
Bose Corp. v. Consumers' Union, 466 U.S. 485 (1984)	41, 43, 43 44, 46
Busbee v. Smith, 549 F.Supp. 494, aff'd 459 U.S. 1166 (1983)	30
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)	50
Diamond v. Charles, 106 S.Ct. 1697 (1986)	3, 10, 12
Epperson v. Arkansas, 393 U.S. 97 (1968)	24, 36, 40
Estate of Thorton v. Caldor, 105 S.Ct. 2914 (1985)	16

TABLE OF AUTHORITIES

	Page
FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985)	44
Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980)	24
Herbert v. Lando, 781 F.2d 298 (2nd Cir. 1986)	43
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981)	24, 30
Kentucky v. Graham, 105 S.Ct. 3099 (1985)	7, 9
Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975)	13
Larson v. Valente, 456 U.S. 228 (1982)	30
Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984)	43
Lemon v. Kurtzman, 403 U.S. 602 (1971)	22, 39
Lynch v. Donnelly, 465 U.S. 668 (1984)	22, 23, 34
Marcone v. Penthouse Magazine, 754 F.2d 1072 (3rd Cir. 1985)	43

TABLE OF AUTHORITIES

	Page
McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D.Ark. 1982)	24, 30
Miller v. Fenton, 106 S.Ct. 455 (1985)	45, 47, 49
Poovey v. Edmisten, 526 F.Supp. 759 (E.D.N.C. 1981)	13
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	51
Renton v. Playtime Theaters, Inc., 106 S.Ct. 925 (1986)	44
Rodgers v. Lodge, 458 U.S. 613 (1982)	50
Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969)	12
Stone v. Graham, 449 U.S. 39 (1980)	23, 24
Wallace V. Jaffree, 105 S.Ct. 249 (1985)	18, 19, 22 23, 26, 27 30, 39, 48

TABLE OF AUTHORITIES

Page

United States Constitution Cited

First Amendment ..... i, passim

Statutes Cited

N.J.S.A. 18A:36-4 ..... i, passim

Rules Cited

Fed. R. Civ. P. 52(a) ..... i, 41, 49, 51

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No. 85-1551

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALAN J. KARCHER, et al.

Appellants,

vs.

JEFFREY, MAY, individually, et al.

Appellees.

On Appeal from the United States
Court of Appeals For the Third Circuit

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, in accordance with Rule 16.1 (c) and (d) of this Court's rules, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals for the Third Circuit on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

As we show, this appeal is non-justicable for two reasons: (1) the appellant lacks standing to process this appeal; and (2) the questions on which the decision of this caase depend are so unsubstantial as not to require briefs on the merits or oral argument in their resolution. The judgment below was clearly correct. The Court of Appeals majority did no more than apply well-

established doctrine concerning the Establishment Clause to undisputed facts.

The appellant's jurisdictional statement sets forth the statute and constitutional provisions involved at p.2. The appellant's summary of the facts of the case and decisions below are summarized on p.3-7 of the Jurisdictional Statement. These matters need not be included at this time.

A. BECAUSE THE ONLY PARTY WITH STANDING TO BRING THE CURRENT APPEAL HAS DETERMINED TO WITHDRAW THE APPEAL, THERE IS NO CASE OR CONTROVERSY AND THE APPEAL MUST BE DISMISSED FOR WANT OF JURISDICTION.

By letter dated May 6, 1986, to the Clerk of the Supreme Court, counsel who

filed the jurisdictional statement in this matter apprised the Court that the current New Jersey Assembly and Senate "do not join in and are not appellants in this matter." (Respondent's App. 2a). Respondents submit that the New Jersey legislature, as Intervenor, was the sole agency who could have processed this appeal. The legislature's withdrawal therefore leaves this Court without a justiciable case or controversy, dictating dismissal of the appeal for lack of jurisdiction. See Diamond v. Charles, 106 S.Ct. 1697, 97 L.Ed. 2d 48 (1986). This conclusion flows from a careful examination of the history of this litigation.

When the instant suit was first brought against the N.J. Department of Education, as the agency which would

implement New Jersey's moment of silence law, the State's Attorney General, as chief law enforcement officer, refused to defend the law. This highly unusual position was prompted by the Attorney General's determination that New Jersey's moment of silence measure was so patently unconstitutional that he could not in good conscience defend it. (See district court opinion, Appellant's App. at 66a). At that point, the New Jersey legislature, through its presiding officers acting in their official capacities, intervened to defend the moment of silence law.

The hearing on the legislature's motion to intervene makes unmistakably clear that the party in interest who was accorded intervenor status was the New Jersey legislature. (The full

transcript of that January 18, 1983 hearing is reproduced in Respondent's Appendix attached at pp. 11a-27a). Counsel for intervenor began the hearing by announcing his appearance "for the General Assembly and Senate, the intervenors." (R. App. 12a). He then explained that he was acting on behalf of both the presiding officers of the Assembly and Senate, Mr. Karcher and Mr. Orechio respectively. (R. App. 12a).

The ensuing discussion at the hearing on intervention made plain that Messrs. Karcher and Orechio were acting purely in their official capacities as representatives of the legislature. After the district court judge's query whether Messrs. Karcher and Orechio would have standing as individuals, the following exchange occurred:

> Mr. Marinari (counsel for intervenor): As the presiding officers of both houses, they are empowered by the rules of both houses to represent the house in litigation.
>
> The court: They are in a representative capacity?
>
> Mr. Marinari: That is correct. (R. App. 15a).

When counsel for plaintiffs commented that the Assembly and Senate would be proper parties, counsel for intervenor replied:

> That is who I am representing. The order says Alan J. Karcher in representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, and the same for the Senate and its body. (R. App. 21a; see also Appellant's App. at 66a where the district court opinion noted that the New Jersey Assembly and Senate had intervened as defendants, and see Appellant's Jurisdictional Statement at p. 5).

The above-described intervention by the state legislature through its presiding

officers was entirely consistent with this Court's view of "officer-capacity suits" as a pleading device to bring into a litigation "the entity of which an officer is an agent." Kentucky v. Graham, 105 S. Ct. 3099, 3105, 87 L.Ed.2d 114, 121 (1985); Bender v. Williamsport Area School District, 106 S.Ct. 1326, 1332, 89 L.Ed. 2d 501, 512-513 (1986).

The intervenor-legislature vigorously conducted both the district court trial and the appeal to the Third Circuit Court of Appeals. No other parties chose to defend the constitutionality of the New Jersey moment of silence law. (See Appellant's Jurisdictional Statement at p. 5).

On January 14, 1986, when the 202d legislature assembled, Messrs. Karcher

and Orechio were succeeded by Chuck Hardwick and John Russo as Speaker of the General Assembly and President of the Senate respectively. By letter dated April 21, 1986, Mr. Hardwick, on behalf of the General Assembly, directed that the instant appeal be withdrawn. (See letter of May 6, 1986, from Mr. Robertson, counsel who filed the Jurisdictional Statement, to the Clerk of the Court). (R. App. 1a). A similar step was taken by Mr. Russo on behalf of the Senate on April 28, 1986. Id. Messrs. Hardwick and Russo, as successors in office to parties named in their official capacities as litigants, are automatically substituted as the representatives of the intervening party in this litigation. Supreme Court Rule 40(3); Stern & Gressman, "Supreme Court

Practice" (5th ed. 1978), #18.5, p. 899; Kentucky v. Graham, supra, 105 S. Ct. at 3105 n.11, 87 L.Ed.2d at 121 n. 11. By a joint statement issued April 28, 1986, Messrs. Hardwick and Russo explained that "careful consideration of financial, constitutional and practical" factors had prompted the decision to withdraw the appeal. (R. App. 10a). Mr. Hardwick explained further, in a letter to the New Jersey ACLU Director dated May 2, 1986, that the "questionable value" of the moment of silence as an educational exercise also influenced the decision to withdraw the appeal. (R. App. 8a).

The only authorized intervenor -- the New Jersey legislature -- having withdrawn its appeal, there is no longer a case or controversy before this

Court. See Diamond v. Charles, 106 S.Ct. 1697, 1703-04 90 L.Ed. 2d 58-59 (1986). Any suggestion that Mr. Karcher could now invoke standing as a current member of the legislature must be rejected. This Court has indicated unmistakably that a party who has litigated in one capacity (such as in an official capacity as speaker of an assembly) cannot alter that status at an advanced appellate level in order to preserve a constitutional issue which the real party in interest (the N.J. legislature) has determined to drop. Thus, in Bender v. Williamsport Area School District, 106 S.Ct. 1326, 1332, 89 L.Ed. 2d 501, 512 (1986), a school board member who had been sued in his official capacity could not launch an appeal in his personal capacity either

as an individual board member or parent. The Court explained:

> The fact that [the board member] was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages. Id. at 1332 n. 6., 89 L.Ed. at 512 n. 6.

A person litigating in one legal capacity cannot acquire standing in another capacity without first securing permission from the trial court. Id. at 1334-35, 89 L.Ed. 2d at 515.

There are additional reasons why Mr. Karcher cannot prosecute this appeal as an individual legislator. Where, as here, a collective body (a legislature)

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a right to appeal. Bender, supra, 106 S.Ct. at 1333, 89 L.Ed. 2d at 513; see Smuck v. Hobson, 408 F.2d 175, 177-78 (D.C. Cir. 1969). "[M]embers of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." Bender, supra, 106 S.Ct. at 1333, 89 L.Ed. 2d at 513. This principle is particularly apt where a state legislative enactment is in question. As this Court has explained:

> [T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State. . . . Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' [necessary] . . . in defending the standards embodied in that code." Diamond v. Charles, supra, 106 S.Ct. at 1705, 90 L.Ed. 2d at 59.

This last quotation from Diamond raises the final bar to an individual

legislator's appeal -- absence of a sufficient personal stake in the outcome to confer standing. An individual legislator ordinarily has no standing in federal court to litigate the constitutionality of a measure adopted by the collective body. Korioth v. Briscoe, 523 F.2d 1271, 1277-78 (5th Cir. 1975). This is so whether the individual legislator is convinced that the statute is unconstitutional and seeks to attack it, or whether the legislator seeks to defend the measure against constitutional attack. See Poovey v. Edmisten, 526 F. Supp. 759, 765 (E.D.N.C. 1981). An individual legislator cannot litigate his constitutional faith in a legislative measure. It is up to the legislature to determine when to defend its own interests.

Any suggestion that Mr. Karcher retains standing to appeal as a representative of the 200th Legislature which terminated at the end of 1983,[1] is totally divorced from reality. As the hearing on intervention before the district court made plain, the legislature was admitted as a party in order to defend the moment of silence law. Neither then nor at any other moment in the protracted course of this litigation was there any suggestion that a prior legislature rather then the current legislature was acting as intervenor. This was true, for example, during the appeal in the Third Circuit

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1. There is a hint to this effect in Mr. Karcher's letter of April 29, 1986, to Mr. Robertson, the counsel who filed the jurisdictional statement in the instant matter. (R. App. 6a).

which was conducted during the term of the 201st Legislature.

It is self-evident that a decision whether to appeal a judgment declaring a state enactment unconstitutional is a matter of policy for the current legislature. Acquiescence in a declaration of unconstitutionality means that a legislative measure will not be currently and prospectively enforced. The primary impact of a decision whether to appeal is on the current constituency of the current legislature. This is true regarding assessment of the many considerations which go into a decision whether to appeal a judgment -- importance of maintaining a statute's force, economic costs to be incurred in the appeal, possible changes in the will of the electorate, and the possibility of

alternative means to accomplish whatever legitimate objectives are at stake. The current legislature, and not the 200th legislature which expired over 2 years ago, is the appropriate body to make a decision whether to appeal. See Estate of Thornton v. Caldor, 105 S.Ct. 2914, 2917 n.7, 89 L.Ed. 2d 557, 562, n. 7 (1985) (1984 Connecticut legislature allowed to intervene to defend a 1976 law). The legislative will, as determined by the duly elected representatives of the legislature's two houses, is to withdraw the current appeal.

Even if there were a case or controversy present in this matter, the internal disarray within the state legislative body would make this case inappropriate for the delicate matter of constitutional adjudication. Avoidance

of unnecessary constitutional adjudication is a basic precept of constitutional jurisprudence.

B. BECAUSE THE DISTRICT COURT ADHERED TO ESTABLISHMENT CLAUSE JURISPRUDENCE, AND BECAUSE TWO COURTS HAVE DETERMINED, BASED ON AN EXTENSIVE TRIAL RECORD, THAT NEW JERSEY'S MOMENT OF SILENCE LAW LACKED ANY REAL SECULAR PURPOSE, THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

This case -- a challenge to the constitutionality of a moment of silence law -- is governed by Wallace v. Jaffree, 105 S. Ct. 2479, 86 L.Ed. 2d 29 (1985). Respondents submit that the lower courts merely applied the teachings of Jaffree to reach a conclusion similar to this Court's conclusion there. Most of Appellant's claims relate to minor evidentiary matters -- e.g., admissibility of hearsay testimony, or relevance of bills adopted by prior legislators -- which do

not warrant Supreme Court attention. Jaffree was decided less than one and a half years ago. There is nothing in the instant case which requires Supreme Court treatment of the "moment of silence" issue so soon after Jaffree's guidance was made available.

Appellant's jurisdictional statement purports to raise "fundamental errors" by the lower courts in applying this Court's Establishment Clause jurisprudence. (See Juris. Statement at pp. 10-11). These accusations are based on Appellant's misconceptions about that jurisprudence. Respondents will undertake here, in brief, to show that neither the district court nor court of appeals deviated from established First Amendment doctrine. Thus, there is no need for plenary consideration of this appeal.

Appellant principally castigates the district court for examining the purpose of New Jersey's moment of silence law despite "a plausible secular purpose" asserted by the legislature. Id. at 19, 23. The legislature did assert during the course of this litigation that the secular purpose of the New Jersey moment of silence law was to create a transition period to calm students at the start of the school day. (See Appellant's App. 10a, 82a). But it is important to note that this avowed secular purpose -- the only one advanced by the legislature -- was propounded for the first time after this litigation commenced. The district court found:

> The purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill.

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> The attempt to develop rational support for the thesis that a minute of silence served a transitional purpose commenced after this law suit was underway rather than before the Bill was adopted. (Appellant's App. 87a-881.)

Appellant errs grievously in thinking that a neutrally worded moment of silence statute[2] is entirely immune from judicial inquiry about legislative purpose to promote religion. This Court

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2. The New Jersey statute does not contain the word "prayer." Yet, as noted, the only secular purpose asserted by the legislature in defending New Jersey's moment of silence law -- a transition period -- does not appear unambiguously on the face of the statute. That purpose was articulated and defended only during the course of the instant litigation, and not before. Moreover, as plaintiffs established at trial, organized group silence and individual "contemplation" -- both of which emerge from the face of N.J.S.A. 18A:36-4 -- constitute traditional religious exercises for some religious sects. Thus, it is arguable that the moment of silence law is not neutral on its face, in terms of religion. In any event, the law does not contain on its face the secular purpose later propounded by the legislature.

has established that pursuant to the "purpose prong" of the tripartite test of Lemon v. Kurtzman, 403 U.S. 602 (1971), a court may examine whether an enactment is preeminently intended to promote religion. In Wallace v. Jaffree, 105 S.Ct. 2479, 86 L.Ed. 2d 29 (1985), Justice Stevens' opinion for the Court explained:

> In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion. Id. at 2490.

Justice O'Connor fixed the same standard in her concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984):

> The proper inquiry under the purpose prong of Lemon . . . is whether the government intends to convey a message of endorsement or disapproval of religion. Id. at 690, 104 S.Ct. at 1368.

Legislative avowal of a secular purpose cannot be allowed to foreclose further judicial inquiry, as it must always be available to a claimant to demonstrate that the avowed purpose is a sham. Wallace v. Jaffree, supra, 105 S. Ct. at 2494, 86 L.Ed. 2d at 48 (Powell, J. concurring); id. at 2500, 86 L.Ed. 2d at 55 (O'Connor, J. concurring). In Stone v. Graham, 449 U.S. 39, 55 (1980), for example, a state statute requiring posting of the Ten Commandments in classrooms specifically proferred a secular justification for the posting requirement. (Indeed, it is likely that the measure in fact had subsidiary secular objectives such as instilling the values of the Ten Commandments and illustrating their connection to our legal system). See Lynch v. Donnelly,

465 U.S. 668, 691, 79 L.Ed.2d 604, 621 (1984)(Justice O'Connor commenting on Stone). But Stone and many lower court opinions make clear that even explicit avowal of a secular purpose on the face of a statute could not shield the statute from scrutiny as to illicit legislative purpose. See, e.g., Karen B. v. Treen, 653 F.2d 897, 900-01 (5th Cir. 1981), aff'd mem. 455 U.S. 913 (1982); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980); McLean v. Arkansas Bd. Educ., 529 F.Supp. 1255, 1263 (E.D. Ark. 1982). See also Epperson v. Arkansas, 393 U.S. 97 (1968).

In accord with the above-described jurisprudence, plaintiffs, in challenging New Jersey's moment of silence law, undertook to demonstrate that the only secular purpose propounded for the

measure -- a transition period between home and school -- was a sham. During a five day trial, they presented 13 witnesses, numerous affidavits, and scores of documents. Intervenor countered with its own witnesses and documents. After considering the various proofs submitted, the district court concluded that the legislature's purported secular justification was "pretextual in nature," and that the moment of silence bill had become, after passage, "a statute in search of a secular purpose." (Appellant's App. 91a). After reviewing the entire record, a majority of the Third Circuit Court of Appeals upheld the district court's finding that the statute lacked a secular purpose. (Appellant's App.

26a-27a)[3] In short, in examining the sham nature of the New Jersey legislature's avowed secular purpose, the district court simply implemented the approach of Wallace v. Jaffree, supra.

The remainder of Appellant's claims relate to the evidentiary base on which the district court made its findings about legislative purpose. The Jurisdictional Statement in this matter refers, inter alia, to an "errant inquiry into subjective legislator motivation," a "reliance on wholly inadmissable hearsay," and a second-guessing of "the wisdom of the New Jersey legislature" in the courts' rejection of the statute's purported secular purpose. (Juris. Statement at

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3. The "clearly erroneous" standard of review employed by the Court of Appeals and attacked by the Appellant will be discussed infra, at Point III.

10-11). Yet, the trial court made its findings about pretext only after consideration of a wide array of proofs appropriate to the difficult task of assessing legislative purpose. Cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266-68 (1977). Jaffree confirmed that a variety of proofs may properly be examined in the course of assessing actual legislative purpose. See Wallace v. Jaffree, supra., 105 S.Ct. at 2499, 86 L.Ed. 2d 54-55 (O'Connor, J. concurring).[4]

Respondents are sensitive to the absence of a full record before the

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4. This question [whether the state has attempted to encourage use of a moment of silence for prayer] cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. Id.

Court. We will briefly describe and analyse the kinds of proofs submitted and relied upon by the trial court. Citations will be to the district court opinion, as contained in Appellant's Appendix. This brief analysis will establish that the Appellant's attack on the evidentiary base of the trial court's findings does not raise substantial constitutional issues meriting plenary review.

1. Content of Legislative Proceedings and Legislators' Statements

Plaintiffs presented several witnesses who testified about the content of legislative hearings and legislative floor debates leading up to the passage of the moment of silence law. (See Appellant's App. 68a-70a). This eyewitness testimony included

quotations of contemporaneous statements by certain members of the legislature.[5] Such testimony was necessitated by the fact that the New Jersey legislature does not maintain a transcript either of committee hearings or of floor debates. (Appellant's App. 14a).

Appellant's Jurisdictional Statement objects strenuously to the district court's inquiry into "subjective motivation of some legislators." (Juris. Statement at 14). Yet numerous decisions have endorsed the use of

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5. While the intervenor-legislature objected strenuously to the "hearsay" nature of this testimony, it presented no testimony or proof which would contradict or even question the accuracy of the plaintiffs' version of the legislative committee hearings or floor debates.

legislators' statements as one element of proof in establishing illicit purpose. See Wallace v. Jaffree, supra, 105 S.Ct. at 2500, 86 L.Ed. 2d at 55; Larson v. Valente, 456 U.S. 228, 254-55 (1982); Busbee v. Smith, 549 F.Supp. 494, 516-17, aff'd, 459 U.S. 1166, 74 L.Ed.2d 1010 (1983); Arlington Heights, supra, 429 U.S. at 268; Karen B. v. Treen, supra; McLean v. Arkansas, supra. Legislators' statements are especially useful where, as here, they are made contemporaneous with the legislative process. Such statements, as well as descriptions of the overall content of the debates, are probative of the arguments and information upon which the legislative body acted. These elements, in turn, are useful in assessing legislative purpose. See

Raveson, "Unmasking the Motives of Government Decisionmakers," 63 No.Car. L. Rev. 879, 975-83 (1986).

The district court used this eyewitness testimony about the legislative process precisely for such a function. That is, testimony that the hearings and debates on N.J.S.A. 18A:36-4 were dominated by notions of public prayer was used as one element of proof in the court's ultimate conclusions about legislative purpose. (See Appellant's App. 90a). The same testimony also demonstrated that the legislature had never received any input

(from educators or any other source) indicating that a "transition period" was needed or would be useful in New Jersey schools.[6]

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6. Appellant accuses the district court of erecting "a new requirement that in order for the court to accept the plausible secular purpose identified by the legislature at trial, that purpose must be shown to have been specifically and explicitly discussed and considered by the legislature." (Juris. Statement at 14). The court set down no such requirement. The court merely, as one element of proof, drew the inference that a total failure to consider a statute's purported secular purpose during committee hearings and debates leading up to passage lends some support to the conclusion that the purported secular purpose did not in fact underlie the legislative action.

2. Experts' Testimony about Pedagogical Value

Among the proofs submitted at trial was expert testimony (by educational psychologists drawn from graduate schools of education) about the disutility of a minute of silence as a transition period. (See Appellant's App. at 84a, 88a). In addition, two veteran school superintendents testified, as well as representatives of the N.J. Education Association (a union representing 84,000 public school teachers) and the N.J. School Board Association (representing 611 school districts). (See id at 71a, 76a-77a).

This testimony was not submitted or used merely for the purpose of questioning the wisdom of the legislature's adoption of a moment of

silence law. The object was to show that the law in its adopted form -- applicable in every public school classroom in every elementary and secondary school in the State -- not only lacked pedagogical or educational value, but would be harmful in some instances. That is, the gap between the moment of silence law as constructed and any possible educational value as a "transition period" was so great as to indicate (along with other proofs) the pretextual nature of the "transition period" rationale. (See Id. at 88a district court finding that a minute of silence would be difficult or detrimental for very young pupils and handicapped pupils). The same expert testimony was also aimed at showing that any purported educational objectives (re

a transition period) could be obtained by other devices or exercises in which prayer would not be implicated. In short, a reasonable fact finder could use the considerable gap between educational utility and the adopted version of the moment of silence law as one element of proof belying the legislature's purported educational justification.

3. Prior Legislative Measures Relating to Silence or Meditation

Another element of proof concerned bills (relating to silence or meditation in the schools) introduced in the New Jersey legislature during the period 1968 to 1982. A number of these prior bills had been adopted by the legislature and vetoed by the governor

-- each time on the basis that the law was unconstitutional and/or lacked educational utility. (See Id. at 10a-11a, 67a). Appellant condemns the use of such an element of proof. (Jurisdictional Statement 14, 25).

These prior legislative measures were introduced as evidence in order to develop the historical background for adoption of the 1982 moment of silence law. The background and origins of legislation can provide a useful link in identifying legislative purpose. See, e.g. Epperson v. Arkansas, 393 U.S. 97, 108 (1968). In the instant case, that background tended to show repeated efforts by pro-prayer forces to adopt measures, including moments of contemplation or meditation, in order to inject prayer into the school day. Such

background was relevant, particularly in addressing questions about the intendment or common understanding of legislative terms like "introspection" and "contemplation" as used in New Jersey's 1982 moment of silence measure. Furthermore, where a clear institutional pattern is established over time, it is even possible to attribute an ongoing institutional purpose to a body whose membership has changed. See Raveson, "Unmasking the Motives of Government Decisionmakers," supra, 63 No.Car. L. Rev. at 966 n.509. Of course, the prior bills were only one element within a network of proofs used by the district court.

The district court's finding about religious purpose was grounded on numerous elements highly relevant to a determination of legislative purpose:

* a dominant focus on religious objectives during the committee hearings and legislative debates;

* contemporaneous statements by some legislators, including the principal sponsor of the legislation, betraying a religious purpose behind the legislation;

* absence of any showing that "transition period" was a concern in the public schools of New Jersey;

* absence of any input to the legislature from educational sources indicating that a "transition period" would be educationally useful;

* information communicated to the legislature by professional groups, intimately involved in public education, that a moment of silence law had no function other than to advance prayer;

* expert testimony that the moment of silence, as structured, would be of marginal educational utility at best, and would be counter-productive as to significant elements in the student population. (See Appellant's App. at 87a-88a).

With all these types of proof as part of the record, the district court

concluded that "the circumstances of the adoption of this particular bill point inescapably to an essentially religious purpose." Id. at 92a. The district court's approach to the "purpose prong" of Lemon v. Kurtzman, supra, was fully consistent with the jurisprudence charted in Wallace v. Jaffree, supra. Jaffree indicated that some moment of silence laws would be upheld, and some would be struck down, depending on the legislative history and other circumstances surrounding the passage of each measure. The district court used the approach signalled by Jaffree in concluding that New Jersey's law, like Alabama's, should be struck down. Omission of the word "prayer" from New Jersey's statute was ultimately deemed a "cosmetic" difference by the court.

(Appellant's App. at 93a). Cf. Epperson v. Arkansas, 393 U.S. 97, 109 (1968). On review of the entire extensive record, a majority of the Court of Appeals upheld the conclusion that New Jersey's law lacked a real secular purpose. In sum, the claims raised in the Jurisdictional Statement with regard to the trial court's findings of legislative purpose are so unsubstantial as not to warrant further argument.

C. A JUDICIAL FINDING OF NO SECULAR PURPOSE IS A FACTUAL FINDING SUBJECT TO THE CLEARLY ERRONEOUS STANDARD OF REVIEW FIXED BY RULE 52(a), AND THE JURISPRUDENCE OF BOSE CORPORATION v. CONSUMERS UNION DOES NOT DICTATE OTHERWISE.

The Jurisdictional Statement in this matter asserts that a finding of religious purpose (or absence of a secular purpose) represents an "ultimate constitutional fact." (Juris. Statement at 25). Appellant then contends that Bose Corp. v. Consumers' Union, 466 U.S. 485, 80 L.Ed.2d 502 (1984) establishes that "questions of constitutional fact compel an appellate court's de novo review of the record." (Juris. Statement at 28). Respondents submit that this contention is so far removed from the appropriate scope of the Bose doctrine as not to warrant plenary consideration.

Bose holds that a finding of "actual malice" in a libel proceeding must be subjected to independent appellate review. While Bose cannot be confined to libel cases, there is considerable indication in the opinion that its teaching is limited principally to the free speech area. Justice Stevens' opinion for the Court explains that independent appellate review of a record has been customary in order to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." Bose, supra, 466 U.S. at 499, 80 L.Ed.2d at 515. To support that conclusion, Justice Stevens relies on precedents treating fighting words, incitement to riot, contempt of court, and obscenity. He then concludes:

> In such cases, the Court has regularly conducted an independent review of the record * * * to be sure that the speech in question actually falls within the unprotected category * * * in an effort to ensure that protected expression will not be inhibited." Id. at 505, 80 L.Ed. 2d at 519.

Certainly, the vast majority of lower court decisions applying Bose relate to free speech issues in which this Court's historical solicitude for the safeguarding of protected speech is implicated. See, e.g., Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986); Marcone v. Penthouse Magazine, 754 F.2d 1072 (3d Cir. 1985); Bartimo v. Horsemen's Benevolent Ass'n, 771 F.2d 894 (5th Cir. 1985); Lebron v. Washington Metropolitan

Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984).[7]

Even if Bose's approach of independent appellate review is not confined to free speech issues, its reach cannot be extended to a finding of illicit legislative purpose. As a first principle, it is important to note that labelling an issue as "a constitutional fact" or "an ultimate fact" does not determine the appropriate scope of review. Rather, the issue is one of

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7. Indeed, it is not yet clear whether Bose even applies to all mixed questions of law and fact concerning the application of free speech principles. See Renton v. Playtime Theaters, 106 S. Ct. 925, 932, 89 L.Ed.2d 29, 42 n.3 (1986)(reserving this issue for future consideration). See also FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41 n.3 (D.C. Cir. 1985)(refusing to apply Bose to an issue of false and deceptive advertising).

proper allocation of judicial responsibility. See Miller v. Fenton, 106 S.Ct. 455, 451-52, 88 L.Ed.2d 405, 413 (1985); Monaghan, "Constitutional Fact Review," 85 Colum. L. Rev. 229, 234-39 (1985). "An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Miller v. Fenton, supra, 106 S.Ct. at 451, 88 L.Ed.2d at 413.

It is true that where certain constitutional rules are applied to factual situations there is a need for independent appellate review in order to safeguard constitutional norms. This is so, for example, where application of a constitutional rule entails weighing the underlying constitutional interests against countervailing governmental

interests. Thus, in "actual malice" libel cases, a court in fixing the degree of fault or recklessness which can sustain a libel judgment implicitly weighs free speech interests against reputational interests. Such a determination involves the evolution and elaboration of a constitutional norm and therefore warrants independent judicial review. See Monaghan, "Constitutional Fact Review," supra, 85 Colum. L. Rev. at 236, 242, 264-68. That is, the content of the constitutional rule concerning "actual malice" is given meaning through an evolutionary process of common law adjudication. See Bose, supra, 466 U.S. at 501-502, 80 L.Ed.2d at 517.

Another area where the fluidity of a constitutional norm has warranted independent appellate review is

"voluntariness" of confessions. See Miller v. Fenton, supra, 106 S.Ct. at 447, 452, 88 L.Ed.2d at 408, 413. A major issue in forced confession cases is whether any particular interrogation technique is "so offensive to a civilized system of justice" as to run afoul of due process limitations. Id. at 449, 88 L.Ed. 2d at 410. Such an issue obviously involves a continuous elaboration of a constitutional norm, and is therefore the kind of substantive constitutional issue whose resolution dictates independent appellate review. (See Monaghan, supra, 85 Colum. L. Rev. at 264-71, for a more complete description of the kinds of constitutional principles whose application in the trial court warrants independent judicial review.)

In the instant moment of silence case, the substantive issue on which review is sought does not implicate the kind of fluid constitutional norm which dictates independent appellate review. Wallace v. Jaffree fixes the relevant norm in administering the "purpose prong" of establishment clause jurisprudence. Purposeful governmental conduct is the key. A legislative measure will be invalidated if it is shown that it lacks a genuine secular purpose, or if "government's actual purpose is to endorse or disapprove of religion." Jaffree, supra, 105 S.Ct. at 2490, 88 L.Ed. 2d at 43.

Actual legislative purpose, in turn, is a factual question whose resolution hinges on resolution of various subsidiary facts. A district court finding on legislative purpose ought

therefore to be subject to the standard of review set down in Rule 52(a). This is so whether the factual finding is grounded on credibility of witnesses, documentary evidence, or inferences from subsidiary facts. The rationale for the "clearly erroneous" standard is still applicable. See Anderson v. Bessemer City, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985); Wright, Federal Courts (4th ed. 1983), #96, pp. 648-49. That illicit legislative purpose may be an "ultimate fact" which incidentally determines the outcome of a particular constitutional litigation does not affect its factual character. See Miller v. Fenton, supra, 106 S.Ct. at 451, 88 L.Ed.2d at 413.

This Court has indicated that district court findings concerning illicit purpose of government

decision-makers -- for example, purposeful racial discrimination -- are subject to the "clearly erroneous" scope of review. In Rogers v. Lodge, 458 U.S. 613, 73 L.Ed.2d 1012 (1982), the "clearly erroneous" standard was applied to a district court finding that an at-large election system had been maintained by the governmental body for invidious purposes. Id. at 622-23, 73 L.Ed.2d at 1021. That standard was applied not just to subsidiary questions of fact, but also to the ultimate factual inference of purposeful discrimination. Id. at 623-24, 73 L.Ed. 2d at 1021-22. See also Dayton Board of Education v. Brinkman, 443 U.S. 526, 534, 540, 61 L.Ed.2d 720, 731, 735 n.12 (1979); Monaghan, supra, 85 Colum. L. Rev. at 265.

The "clearly erroneous" standard of Rule 52(a) has also been applied by this Court to findings of purposeful discrimination made pursuant to Title VII of the Civil Rights Act of 1964. Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66 (1982) held that intentional discrimination (regarding establishment of a seniority system) is a pure question of fact subject to Rule 52(a). The Court commented:

> Treating issues of intent as factual matters for the trier of fact is commonplace. In Dayton Board of Education v. Brinkman * * * , the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly erroneous rule. Pullman-Standard, supra, 456 U.S. at 288, 456 U.S. at 288, 72 L.Ed.2d at 79.

In Anderson v. Bessemer City, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), this Court mandated a "clearly erroneous" standard of review for a judicial determination that a government agency had engaged in purposeful discrimination in making a hiring decision. Anderson indicated that the court of appeals should have applied a deferential standard of review both to the district court's findings about subsidiary facts and about the ultimate question of purposeful discrimination, 105 S.Ct. at 1513-15, 84 L.Ed.2d at 530-32. Justice White's opinion commented:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's effort in the court of appeals would very likely contribute only negligibly to

the accuracy of fact determination at a huge cost in diversion of judicial resources, 105 S.Ct. at 1512, 84 L.Ed.2d at 529.

The same considerations dictating application of a "clearly erroneous" standard to factual findings of racially discriminatory purpose dictate application of an identical standard to findings of religious purpose. Both areas involve the application of a settled constitutional norm to disputed facts -- grist for the mill of federal district courts. There is no precedent mandating a searching appellate review of findings regarding religious purpose. In short, the issue of application of the Bose standard to the purpose prong of Lemon v. Kurtzman does not merit plenary consideration.

CONCLUSION

The instant appeal should be dismissed for want of jurisdiction -- there being no party before the Court with standing to appeal. Alternatively, the judgment upholding the district court's finding that New Jersey's 1982 moment of silence law is unconstitutional should be summarily affirmed.

Respectfully submitted,

PELLETTIERI, RABSTEIN AND ALTMAN
Attorneys for Appellees

RICHARD M. ALTMAN

DATE: July 25, 1986

Hannoch Weismann letter to the Clerk of the Supreme Court of the United States.

May 6, 1986

Express Mail

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Re: Docket No. 85-1551, October Term, 1985
Alan J. Karcher, et al. vs.
Jeffrey May, et al.

Dear Mr. Spaniol:

In connection with the above-captioned matter, counsel for the appellants respectfully calls to the Court's attention letters dated April 21, 1986 and April 29, 1986, from the Honorable Charles Hardwick, the Speaker of the 202nd New Jersey General Assembly, and from Leon Sokol, counsel to the President of the 202nd New Jersey Senate (the Honorable John Russo), to the undersigned directing that the appeal be withdrawn on behalf of both the 202nd New Jersey General Assembly and the 202nd New Jersey Senate of which Mr. Hardwick and Mr. Russo are the presiding officers.

Copies of Mr. Hardwick's and Mr. Sokol's letter on behalf of Mr. Russo are enclosed.

Counsel has also received a letter from the Honorable Alan J. Karcher, Minority Leader of the 202nd New Jersey General Assembly and the Speaker of the 200th New Jersey General Assembly -- the body that originated the legislation which is the subject matter of the instant appeal. Mr. Karcher's letter indicates that it is his position that the presiding officer of the 202nd Legislature are not in fact my clients in this matter and that it is not his desire to have the instant appeal abate.

A copy of Mr. Karcher's letter is also enclosed.

In accordance with Mr. Hardwick's and Mrs. Russo's (through Mr. Sokol) directives, I respectfully request that their letters be brought to the Court's attention and that the Clerk's file be marked to indicate that the Assembly and the Senate of the current (202nd) New Jersey Legislature do not join in and are not appellants in this matter; and if deemed so withdraw from the appeal.

In response to Mr. Karcher's communication, the undersigned counsel is in the process of researching and, if appropriate, preparing a motion to effect whatever change may be necessitated by reason of Mr. Hardwick's and Mr. Russo's recent communications. Cf. Bender v. Williamsport, ___ U.S. ___, 54 U.S. L.W. 4307 (March 25, 1986).

By a copy of this letter, I am advising counsel of record for the respondents of Mr. Hardwick's, Mr.

Sokol's and Mr. Karcher's communications.

I respectfully request that the foregoing letter and its enclosures be appropriately communicated to the Court for whatever additional guidance or directives it believes are warranted under the circumstances.

Respectfully yours,

WILLIAM W. ROBERTSON

WWR/jlb
Encs.

cc: Richard M. Altman, Esq.
Jack D. Novik, Esq.
Alfred A. Ramey, Jr., Esq.
Bradley S. Brewster, Esq. (for Speaker Charles Hardwick)
Leon J. Sokol, Esq. (for President John F. Russo)
Alan J. Karcher, Esq.
Lawrence T. Marinari, Esq.
Rex E. Lee, Esq.

Letter from Chuck Hardwick, Speaker of the New Jersey Assembly, directing withdrawl of appeal from May v. Cooperman.

April 21, 1986

William W. Robertson, Esquire
Hannoch Weissman
4 Becker Farm Road
Roseland, NJ 07068-3788

Dear Mr. Robertson:

Please let this letter advise you that on behalf of the New Jersey General Assembly, I hereby direct you to immediately withdraw the appeal to the United States Supreme Court filed by you on behalf of the Legislature in the matter of May v. Cooperman.

You are authorized to take all necessary steps to accomplish this directive.

Please copy me on all correspondence to the Court.

Sincerely yours,

Chuck Hardwick

CH/BB/bh

Letter withdrawing appeal of May v. Cooperman from Leon J. Sokol on behalf of John Russo, President of the Senate.

April 29, 1986

William Robertson, Esq.
Hannoch Weissman, Esqs.
4 Beck Farm Road
Roseland, New Jersey 07068

Re: May v. Cooperman

Dear Bill:

Confirming our telephone conversation of April 28th, I have been authorized by Senator Russo to advise you that effective this date, you are to communicate on his behalf with the U.S. Supreme Court, withdrawing the appeal now pending in the aforementioned action. Senator Russo, therefore, joins with Speaker Hardwick in the communication the Speaker previously sent to you giving identical instructions.

Sincerely,

LEON J. SOKOL

LJS/zs
CC: Senator John F. Russo
Speaker Charles Hardwick
Bradley Brewster
Kathy Crotty
Lawrence T. Marinari, Esq.

Alan Karcher letter to Appellant Attorneys.

April 29, 1986

William W. Robertson, Esq.
Hannoch Weisman, P. A.
4 Becker Farm Road
Roseland, New Jersey 07068-3788

Re: Karcher, et al vs. May et al

Dear Bill:

This will confirm my various conversations with you. I have seen the directive sent to you by Speaker Hardwick and Senate President Russo. I emphasize that they are the presiding officers of the 202nd Legislature and are not, in fact, your clients.

The legislative action in question was the product of the 200th Legislature and specifically was a bill which had the General Assembly as its house of origin. The 200th Legislature has an independent legal existence separate and apart from the 202nd Legislature and it is in fact that legislative body which is your client. As the presiding officer of the house of origin of the legislation in question, it is my position that I am the only valid representative of your client and it is not my wish nor do I

think the wish of the members of the 200th Legislature to abort this litigation which is now on the threshold of resolution by the United States Supreme Court.

You should further know that if, in fact, I may be incorrect in asserting that the 200th Legislature, i. e., your client, is not a separate legal entity from the 202nd Legislature, then it would be my intention to request that this matter be resolved by a full vote in both the Senate and Assembly so that each member of the Legislature might record themselves as to their position in reference to this matter.

Trusting this is satisfactory, I remain,

Yours very truly,

Alan J. Karcher
Minority Leader

AJK/mgp

Letter from Chuch Hardwick to Jeffrey Fogel.

May 2, 1986

Mr. Jeffrey Fogel
Director, ACLU
38 Walnut Street
Newark, NJ 07102

Dear Mr. Fogel:

As you may have recently read, Senate President John Russo and I have directed counsel to withdraw the appeal in the "Moment of Silence" lawsuit.

Our final decision is based on the belief that whether the United States Supreme Court rules the legislation unconstitutional or constitutional, the people of New Jersey will be losers if an appeal is pursued. If the statute is found to be unconstitutional, additional expense will have to be paid by our state's taxpayers. If on the other hand, our nation's highest court decides that the legislation requiring teachers to permit a moment of silence is constitutional, then our state's school children and teachers would be saddled with a practice of questionable value that may even be counterproductive to sound education practices.

For your information, I have enclosed a copy of the statement which was released by the Senate President and me.

Sincerely yours,

Chuck Hardwick

Enclosure
CH/BB/bh

Statement by Senate President John F. Russo and Assembly Speaker Chuck Hardwick concerning the Moment of Silence Case.

After careful consideration of the financial, constitutional and practical aspects of the Moment of Silence Case, we are directing counsel for the Assembly and Senate to inform the U.S. Supreme Court that the General Assembly no longer intends to appeal the decision.

If the statute is found to be unconstitutional, additional expense will have to be paid by our state's taxpayers. Legal fees associated with this case have reach approximately $230,000. In addition, the state is potentially liable for another $100,000 in legal fees for the parties who brought the suit.

Even though Mr. Robertson has offered to forego additional personal fees for the appeal, the additional out-of-pocket and plaintiff attorney fees incurred by another appeal would have to be paid by New Jersey taxpayers.

Accordingly, we have directed counsel for the Assembly and the Senate to inform Mr. Robertson that he should immediately withdraw the appeal on behalf of the General Assembly and Senate of New Jersey.

Chuck Hardwick John F. Russo

April 28, 1986

United States District Court
District of New Jersey
Civil No. 83-89

- - - - - - - - - - - - - - - -
JEFFREY MAY, et al,
:
Plaintiffs,
:
v.
:
DR. SAUL COOPERMAN,
et al, :
Defendants.
- - - - - - - - - - - - - - - -

January 18, 1983
Trenton, New Jersey

B E F O R E:

THE HONORABLE DICKINSON R. DEBEVOISE, U.S.D.J.

A P P E A R A N C E S:

PELLETTIERI, RABSTEIN & ALTMAN, ESQS.,
BY: ANNE MC HUGH, ESQ.,
For the Plaintiffs.

MARINARI & FARKAS, ESQS.,
BY: LAWRENCE T. MARINARI, ESQ.,
For Karcher, Orrechio, General Assembly and Senate

THE COURT: Good morning. Are we ready to proceed?

MS. MC HUGH: I am Anne McHugh on behalf of the plaintiffs from Pellettieri, Rabstein and Altman.

MR. MARINARI: I am from Marinari & Farkas. I am Lawrence Marinari for the General Assembly and Senate, the intervenors.

THE COURT: Who are you actually appearing for now?

MR. MARINARI: I am appearing for both the presiding offiers of the House and New Jersey Senate and New Jersey General Assembly.

THE COURT: Have you formally intervened?

MR. MARINARI: I was about to file the motion returnable today, but I was told by your clerk that you wanted a short time limit motion, and you would prefer to have it at some later time.

THE COURT: I thought we could do it right now.

MR. MARINARI: I have the consent of everybody else. I would move on behalf of Alan Karcher and Carmen A. Orrechio as presiding officers of the New Jersey General Assembly and Senate to be made a party, direct defendant in this matter. I have consulted with all respective parties presently in the case, and they have consented to my appearance.

THE COURT: So they would be intervening, and you would be representing them?

MR. MARINARI: That is correct.

THE COURT: Mrs. McHugh, any objection to that?

MS. MC HUGH: Judge, on behalf of the plaintiffs, I have no objection aside from the fact, and this is a

point of clarification that the Court can give to us. Mr. Marinari and I have discussions as to who he represents and how he regards his role in this litigation.

I just want to be certain that it is the Assembly and the Senate that are entities that he represents, and for example if discovery entails depositions of various Senators and/or Assembly persons that Mr. Marinari would consider them parties, respective members of the Legislature and would produce them upon a notice to produce for discovery. That sort of thing, and that it is not Mr. Karcher and Mr. Orrechio that are his clients, but the Legislature and its various members.

THE COURT: Well, I didn't understand you to say that.

MR. MARINARI: I didn't, your Honor.

THE COURT: So I think it is just those two individuals. Would they have standing as such, as individuals?

MR. MARINARI: As the presiding offiers of both houses, they are empowered by the rules of both houses to represent the House in ligitation.

THE COURT: They are in a representative capacity?

MR. MARINARI: That is correct.

THE COURT: Then maybe it would follow that the members of the two houses would be subject to deposition on notice if they are subpoenaed.

MR. MARINARI: I will cooperate with Mrs. McHugh every way I can so anyone she requests to depose is available for deposition. I can't guarantee all 120 people will abide by my request, and she has the rules of court that would enable her to compel that if

necessary, and at that point I would make a decision whether I would invoke any privileges they may have.

THE COURT: I hope you won't need 120.

MS. MC HUGH: I don't envision that, but there are indications, and I don't know the ruling of the Court. I would like to brief the issue. I don't thinks Messrs. Karcher and Orrechio are proper parties. I think it is the Legislature as a whole, separate entities.

MR. MARINARI: The institution is coming in as an institution. I can't come in for each of the 120 individuals directly. I have not polled each one of them.

THE COURT: You say there is a rule which provides the Speaker of each House --

MR. MARINARI: It is the presiding officer of each House and in charge of all administrative duties, and from that we have been in numerous suits and have cooperated with counsel anytime they want a deposition. I don't envision this to be a problem, your Honor.

THE COURT: I don't either. What we want is a presence in some form or other to advance that issue. I think it is important to have somebody enthusiastically in support of this statute as party to this action.

So I will grant the motion for intervention for Mr. Karcher and Mr. Orrechio in their capacities as Speakers of the respective Houses, and what the implications as far as that position is I won't decide now, but I am assuming the parties can work that out, and it won't come to any formal

difficulty. If it does, we can resolve the matter.

MS. MC HUGH: Could I be heard? One further point though. For example, there are a lot of statements that have been made by various members of the Legislature. Would they be considered admissions? I would consider them admissions against a party. That would be a very significant ruling, I think, and that wouldn't be --

THE COURT: That is an evidential ruling.

MS. MC HUGH: That is right, Judge, but if it is the Legislature, it is not intervening as a whole, I see them as General Motors Corporation and the various members of the Legislature making up this entity and in the same way an admission by an employee of General Motors would be an admission

against General Motors, similarly that would apply with equal force to the Legislature. But if they are coming in just as Carmen Orrechio and Alan Karcher, that is a different entity.

THE COURT: Suppose they didn't mean to intervene? You would still hope to introduce the statements? You have the problem no matter what I do.

MS. MC HUGH: That is correct.

THE COURT: Suppose there was no intervention, would you say I could not admit those statements because they were not parties, and therefore would not be deemed to be admissions against interest.

MS. MC HUGH: No. There would be another basis.

THE COURT: Let's rely on this other basis at this point. It doesn't make a difference whether they are

parties or not. I am confident one way or the other what the Legislature said in support of the statute will be admissible, and whether they are formally parties to the action or not parties to the act, those statements are evidence of what the legislative purpose was in adopting the statute. That is how I would view it right now. It doesn't make a difference whether the legislature is a party to the action or not a party to the action.

MS. MC HUGH: Fine. That is the Court's ruling. That is my primary concern.

THE COURT: I don't see that affects the intervention motion because you would prefer to have somebody else intervene. It is not a reason for not permitting these people to intervene.

MS. MC HUGH: I do think the General Assembly and Senate are proper parties and can be represented by Orrechio and Karcher, but those entities --

MR. MARINARI: That is who I am representing. The order says Alan J. Karcher in representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly and the same for the Senate and its body.

THE COURT: You have an order there?

MR. MARINARI: Yes, I do.

THE COURT: Hand it up. See what we are doing. Maybe that will solve Mrs. McHugh's problems.

It seems to me this brings everybody in.

MS. MC HUGH: I have no objection.

THE COURT: Let me read what the operative language of the order is. "It is ordered that Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, Carmen A. Orrechio in his representative capacity as President of the New Jersey Senate and the New Jersey Senate be permitted to intervene as direct party defendants in Civil Action 83-89." You have everybody on that order.

MS. MC HUGH: That is fine. Then I have no objection.

THE COURT: Why don't I just sign the order now and then we will have some genuine opponents for the plaintiff.

Then I will file this order and that resolves that matter.

I gather the parties have agreed to a continuation of the restraints.

MS. MC HUGH: That is right, Judge.

THE COURT: And adjournment of the matter.

MR. MARINARI: That is correct, your Honor.

THE COURT: A formal order?

MS. MC HUGH: I have the original order as well as the consent order regarding discovery in this matter.

THE COURT: I will look at the consent order regarding discovery first. There is one blank. All depositions are to take place at blank, New Jersey.

MS. MC HUGH: We couldn't resolve that, and we did this morning. Either Newark or Trenton is fine.

THE COURT: Newark or Trenton, I will put in there.

MS. MC HUGH: That is correct.

THE COURT: At whose choice? Whose election?

MS. MC HUGH: At the election of the deponent.

THE COURT: That is the person whose deposition is being taken?

MS. MC HUGH: That is correct, Judge.

MR. MARINARI: That is correct.

THE COURT: So the place is to be at the election of the deponent.

We will set this down for hearing on preliminary and permanent injunctive relief on February 24, on the 24th day of February. Then I take it there is agreement the matter will be consolidated, that is the application for the preliminary injunction will be consolidated with the final hearing?

MR. MARINARI: That is correct, your Honor.

MS. MC HUGH: That is correct.

THE COURT: I won't write that in here, but that is what is understood, and there are places on here for each of your signatures so I can give that back for the moment.

The language of the consent order, I am not sure it says exactly what you mean. It says "ordered that the temporary restraints entered by this Court on January 10, 1983, are continued." Technically that means they are adjourned. You mean to remain in effect?

MS. MC HUGH: That is correct.

THE COURT: Until the date of final hearing or until February 24, I guess it would be.

MS. MC HUGH: Right, Judge.

MR. MARINARI: That is correct.

THE COURT: So I will just change that.

MR. MARINARI: Continue in effect.

THE COURT: Are to remain in effect. The order recites that the continuation of the restraints is with the consent of the attorneys for all of the parties. I take it one or the other of you have spoken to all counsel?

MS. MC HUGH: Yes, I did. I spoke to counsel for the respective defendants.

MR. MARINARI: I have no objection.

THE COURT: Well, I think it makes sense to consolidate the final hearing, and to take the time now to complete discovery. I would hope discovery could be compressed into that time. I should think it could.

MS. MC HUGH: That is the arrangement. I anticipate that we can. Apparently counsel for the other defen-

dants do not intend to engage in any discovery. We will notice them, of course.

THE COURT: Anything else we should take up?

MR. MARINARI: I don't believe so, your Honor.

MS. MC HUGH: That is it.

THE COURT: Thank you very much. There are some matters for you to sign.

Perhaps you ought to consent to the order on the restraints also. Both of you might just do that.

I will see you on the 23rd, not the 24th, and that will be in Newark.

MS. MC HUGH: 9:00 a.m.?

THE COURT: Let's make it 9:00 a.m. We will get started early, and maybe we can finish in one day.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALAN J. KARCHER, et al.

Appellants,

vs.

JEFFREY, MAY, individually, et al.

Appellees.

On Appeal from the United States
Court of Appeals For the Third Circuit

AFFIDAVIT OF SERVICE

STATE OF NEW JERSEY)
)
COUNTY OF MERCER)

Jane P. Maracani, of full age, being duly sworn, according to law, upon my oath, deposes and says:

1. I am employed by Pellettieri, Rabstein and Altman, attorneys for appellees in this case.

2. I did on this 25th day of July, 1986, mail three copies of the appellee's Motion to Dismiss or Affirm in the above captioned case, in envelopes properly addressed and first class postage prepaid, to counsel of record for all the appellants herein, as follows:

William W. Robertson
Hannoch Weisman
4 Becker Farm Road
Roseland, New Jersey 07068
Attorneys for Appellants
Alan J. Karcher, et al.

Jane P. Maracani
JANE P. MARACANI

Sworn to and subscribed to before me this 25th day of July, 1986.

NOTARY PUBLIC OF NEW JERSEY

Nancy M. Delgado
Notary Public of New Jersey
My Commission Expires Aug. 28, 1986

Supreme Court, U.S.
FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

In The
Supreme Court of the United States
October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

JOINT APPENDIX

Volume I, pages 1 to 226

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JURISDICTIONAL STATEMENT FILED MARCH 19, 1986

JURISDICTION POSTPONED JANUARY 27, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

INDEX TO JOINT APPENDIX

Page

Chronological List of Relevant Docket Entries in the United States Court of Appeals for the Third Circuit 1

United States District Court for the District of New Jersey Docket Entry Sheet 2

Complaint, Affidavit of Brenda Butler; Affidavit of Cary Butler; Affidavit of Mark Tulloss; Affidavit of Jean Ross; Affidavit of Dr. Reverend George Younger; Affidavit of Reverend Dudley E. Sarfaty; Affidavit of Jeffrey May; Affidavit of Rita Rothenberg; Affidavit of Gary Drew 13

Order to Show Cause, Dated January 10, 1983 47

Order Granting Temporary Restraint, Dated January 14, 1983 50

Order Permitting Intervention, Dated January 18, 1983 53

Answer of Intervenors-Defendants' Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly; The New Jersey General Assembly; Carmen A. Orechio in his representative capacity as President of the New Jersey Senate; and The New Jersey Senate, Dated February 18, 1983 55

Notice of Motion by Intervenors-Defendants, Dated February 22, 1983 58

Notice of Motion and Affidavit of Anne McHugh, Esq., Dated April 18, 1983 60

Transcript of Proceedings on Motion, Dated April 20, 1983 89

Excerpts from testimony of Langdon Gilkey, witness on behalf of plaintiffs

Direct Examination, pgs. 20-54 129

Cross Examination, pgs. 60-81 160

INDEX TO JOINT APPENDIX—Continued

Page

Excerpts from testimony of Peter J. Kuriloff, witness on behalf of plaintiff
Direct Examination, pgs. 83-105; 118-120 181
Cross Examination, pgs. 120-148 204
Re-direct Examination, pgs. 148-151 224

Excerpts from testimony of Paul D. Houston, witness on behalf of plaintiffs
Direct Examination, pgs. 170-186 227
Cross Examination, pgs. 186-197; 199-206 242
Re-direct Examination, pgs. 206-211 256

Excerpts from testimony of Joseph Nathan Chuman, witness on behalf of plaintiffs
Direct Examination, pgs. 212-221 261

Excerpts from testimony of Marianne E. Rhodes, witness on behalf of plaintiffs
Direct Examination, pgs. 225-227; 229-230 272
Cross Examination, pgs. 234-235; 237-239 276
Re-direct Examination, pgs. 239-241 280

Excerpts from testimony of Lloyd J. Newbaker, witness on behalf of plaintiffs
Direct Examination, pgs. 246-257 284
Cross Examination, pgs. 257-263 294
Re-direct Examination, pgs. 263-264 300

Excerpts from testimony of Stanley L. Rosner, witness on behalf of plaintiffs
Direct Examination, pgs. 264; 268-275 301
Cross Examination, pgs. 276-278 309

INDEX TO JOINT APPENDIX—Continued

Page

Excerpts from testimony of Thomas C. Thompson, witness on behalf of intervenors-defendants
Direct Examination, pgs. 356-357; 363-364 313

Cross Examination, pgs. 395; 404; 407; 426; 430; 445-446; 453; 458-460 316

Excerpts from testimony of Evelyn A. Swenson, witness on behalf of intervenors-defendants
Direct Examination, pgs. 467; 469-470; 473-475 ... 327

Excerpts from testimony of John B. Singer, witness on behalf of intervenors-defendants
Direct Examination, pgs. 498-499 333

Cross Examination, pgs. 505-521 335

Excerpts from testimony of Adam Scrupski, witness on behalf of intervenors-defendants
Direct Examination, pgs. 532-535; 542 352

Cross Examination, pgs. 543-545; 561 357

Excerpts from testimony of Jerome Aumente, witness on behalf of intervenors-defendants
Direct Examination, pgs. 603-604; 613-616 361

Excerpts from testimony of Dudley E. Sarfaty, witness on behalf of plaintiffs
Direct Examination, pgs. 647-654 367

Excerpts from testimony of James Connerton, witness on behalf of plaintiffs
Direct Examination, pgs. 656-659; 661-662 375

Plaintiffs' Exhibit 55, Governor Thomas H. Kean, Letter to the General Assembly 381

Plaintiffs' Exhibit 56, New Jersey Senate Roll Call 384

Plaintiffs' Exhibit 57, New Jersey Assembly Roll Call 386

Plaintiffs' Exhibit 58, New Jersey Senate Roll Call 389

Plaintiffs' Exhibit 59, New Jersey Assembly Roll Call 391

INDEX TO JOINT APPENDIX—Continued

Page

Plaintiffs' Exhibit 63, Governor Cahill Veto of Assembly Bill No. 597, 3/8/71 394

Plaintiffs' Exhibit 64, Governor Byrne's Veto of Assembly Bill No. 648 (OCR), 3/3/78 397

Plaintiffs' Exhibit 65, Governor Byrne's Veto of Assembly Bill No. 2197 (OCR), 5/4/81 399

Plaintiffs' Exhibit 67, The New Jersey Council of Churches Release 400

Plaintiffs' Exhibit 69, New Jersey School Boards Association Position Statement, 12/13/82 403

Plaintiffs' Exhibit 77, Memorandum by Marianne Rhodes on Assembly Education Committee Meeting, Monday, May 17, 1982 405

Notice of Appeal, Filed February 14, 1984 410

Order of the Supreme Court of the United States dated January 27, 1987 postponing further consideration of the question of jurisdiction to the hearing of the case on the merits 412

The following opinions, judgment, orders and other relevant documents have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement or to the Motion To Dismiss Or Affirm filed in this matter:

APPENDIX JURISDICTIONAL STATEMENT:

A. Opinion of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126) 1a

B. Opinion of the United States District Court for the District of New Jersey 62a

INDEX TO JOINT APPENDIX—Continued

		Page
C.	Order of the United States District Court for the District of New Jersey	101a
D.	Judgment of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126)	103a
E.	Notice of Appeal to the Supreme Court of the United States and Proof of Service	106a
F.	Assembly Bill No. 1064	110a

APPENDIX TO MOTION TO DISMISS OR AFFIRM:

A.	Letter of appellants' counsel dated May 6, 1986 to Clerk of the Supreme Court of the United States	1a
B.	Letter of Chuck Hardwick, Speaker of the New Jersey General Assembly, dated April 21, 1986	4a
C.	Letter of Leon Sokol on behalf of John Russo, President of the New Jersey Senate, dated April 29, 1986	5a
D.	Letter of Alan J. Karcher, Minority Leader of the New Jersey General Assembly, dated April 29, 1986	6a
E.	Letter of Chuck Harwick, Speaker of the New Jersey Assembly, dated May 2, 1986	8a
F.	Statement dated April 28, 1986 by Senate President John F. Russo and Assembly Speaker Chuck Hardwick concerning the Moment of Silence Case	10a
G.	Transcript of hearing before the Honorable Dickinson R. Debevoise, U.S.D.J., for the District of New Jersey, dated January 18, 1986	11a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (Nos. 83-5890 and 84-5126)

Feb. 17, 1984—Appellants' notice of appeal filed.

May 22, 1984—Appellants' brief and appendix filed.

June 21, 1984—Appellees' brief filed.

July 9, 1984—Appellants' reply brief filed.

Oct. 25, 1984—Oral argument on merits heard.

Nov. 7, 1984—Letter from the Clerk of the Court advising counsel that the court will stay disposition of matter pending disposition of *Wallace v. Jaffree* and *Smith v. Jaffree* cases in the United States Supreme Court.

June 5, 1985—Letter from the Clerk of the Court to counsel directing submission of letter briefs pertaining to United States Supreme Court's decision in *Wallace v. Jaffree* and *Smith v. Jaffree.*

June 20, 1985—Submission of letter brief by appellants.

July 1, 1985—Submission of letter brief by appellees.

Aug. 13, 1985—Re-Argument on merits heard.

Aug. 19, 1985—Submission of letter by appellants pertaining to trial record support of secular purpose.

Aug. 29, 1985—Submission of letter by appellees in response to appellants' letter of August 19, 1985.

Dec. 24, 1985—Opinion of the United States Court of Appeals for the Third Circuit filed (Nos. 83-5890 and 84-5126).

Dec. 24, 1985—Judgment of the United States Court of Appeals for the Third Circuit filed (Nos. 83-5890 and 84-5126).

Jan. 15, 1986—Letter from the Clerk of the Court to counsel releasing the certified list in lieu of the record.

UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEW JERSEY
DOCKET ENTRY SHEET

Civil Action No. 83-0089

PLAINTIFFS	DEFENDANTS
JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK SCHORSKE, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually	DR. SAUL COPPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION (defendant-intervenors) Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate and the New Jersey Senate New Jersey Council of Churches (Amicus Curiae) New Jersey Education Association (Amicus Curiae)

CAUSE

Civil Rights-moment of silence New Jersey School System (P.L. 1982, Ch. 205). JJF

ATTORNEYS

Pellettieri, Rabstein and Altman
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(COOPERMAN, Com. of Ed., NJ. Dept. of Ed.)
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(Edison Board of Ed.)

J.S. 6 11-15-

DATE	FILING FEES PAID RECEIPT NUMBER	
1-10-83	54004 ($60.00)	C.D. Number / Card
12-14-83	062639 $70.00	Statistical Cards / Date Mailed

DATE	NR.	PROCEEDINGS Judge Debevoise — Civil 83-89
1-10-83	1	Complaint filed.
1-10-83	2	Notice of Allocation and Assignment filed (Trenton-Debevoise)
1-10-83	3	Plaintiff Motion for Tempory Restraining Order, filed.
1-10-83	4	Statement by plaintiff re: nonisuance of summons filed.
1-10-83	5	Verification of Jeffrey May filed.
1-10-83	6	Order to show cause why a preliminary and permanent injunction should not be issued on 1-18-83 at 9:00 A.M. with temporary restraints and directing defendants to answer complaint within 20 days of serv. filed. (Debevoise) (copies mailed)
1-12-83		Hearing on plaintiffs' application for temporary injunction. Ordered application granted. Ordered that defendants show cause on 1-18-83 at 9:00 A.M. why a preliminary and permanent injunction should not be issued. (Debevoise) (1-10-83)
1-14-83	7	Order directing defendant Cooperman to notify school districts of State of New Jersey and direct them to cease enforcement of P.L. 1982, Ch. 205 pending hearing for preliminary injunction filed. (Debevoise) (copies mailed)
1-17-83	8	Order Re-allocating case from Trenton to Newark filed. (Debevoise) (Notice Mailed)
1-18-83	9	Order permitting Alan J. Karcher as Speaker of the New Jersey General Assembly; New Jersey General Assembly; and Carmen A. Orechio as President of New Jersey Senate and New Jersey Senate to intervene as party defendants filed. (Debevoise) (copies mailed)
1-18-83	10	Consent order extending temporary restraints pending hearing on prel. injunction filed. (Debevoise) (copies mailed)

DATE	NR.	PROCEEDINGS
		Judge Debevoise Civil 83-89
1-18-83	11	Consent order re: discovery; directing that all discovery be completed 2-15-83 and scheduling hearing on preliminary and permanent injun. for 2-23-83 filed. (Debevoise) (copies mailed)
1-21-83		Hearing on plaintiff's application re: requesting that temporary res. contained in court's order of 1-10-83 remain in effect until final hearing for preliminary injunction (Debevoise) (1-18-83)
1-21-83		Hearing on application of Alan J. Karcher and Carmen A. Orechio to intervene. Ordered application granted. (Debevoise) (1-18-83)
1-25-83	12	Transcript of hearing held on 1-18-83, filed 1-24-83.
1-25-83	13	Transcript of hearing taken on 1-10-83, filed 1-24-83. (re: Order to Cause)
2- 2-83	14	Notice of motion and motion of New Jersey Council of Churches for permission to appear, file a brief and make oral argument as amicus curiae in action returnable 2-14-83; statement in lieu of brief and proof of mailing, filed 1-27-83.
2-14-83	15	Notice of motion of the N.J. Education Association, for leave to intervene as Amicus Curiae, returnable 2-28-83, and proof of mailing, filed. (Statement in lieu of Brief)
2-18-83	16	Order granting the N.J. Council of Churches leave to intervene as amicus curiae, filed 2-15-83. (Debevoise) Notice Mailed.
2-23-83	17	Order re discovery; scheduling a status conference for 3-14-83, and adjourning hearing date on preliminary and permanent injunction, etc., filed 2-18-83. (Debevoise) Notice Mailed.

DATE	NR.	PROCEEDINGS Judge Debevoise — Civil 83-89
2-24-83	18	Notice of Motion of defendants Alan J. Karcher and Carmen A. Orechio, for an order suppressing or limiting plaintiffs' right to propound interrogatories or take certain depositions, returnable 3-14-83, and certificate of mailing, filed 2-22-83. (Brief submitted)
2-25-83	19	Notice of Appearance of counsel for defendants Alan J. Karcher and Carmen A. Orechio, filed 2-24-83.
2-28-83	20	*Answer* of Alan J. Karcher, Carmen A. Orechio and the N.J. State Senate, and proof of mailing, filed 2-23-83.
3- 1-83	21	*Answer* of defendants Saul Cooperman, Commissioner of Education and N.J. Department of Education, filed 2-28-83.
3- 1-83	22	Affidavit of service of answer of defendants Saul Cooperman, Commissioner of Education and N.J. Department of Education, filed 2-28-83.
3- 1-83		At call for hearing on motion of the N.J. Education Assoc. for leave to intervene as Amicus Curiae, Court indicated a consent order to be submitted. (Debevoise) (2-28-83)
3- 1-83	23	Order granting the N.J. Education Assoc. leave to intervene as amicus curiae, filed 2-28-83. (Debevoise) (2-28-83)
3- 3-83	24	Notice of motion of the American Jewish Congress for leave to intervene as amicus curiae, returnable 3-14-83, statement in lieu of brief and proof of mailing, filed 3-7-83.
3- 3-83	25	Affidavit of Kenneth S. Goldrich, filed 3-7-83.
3-10-83	26	*Answer,* of defendant Old Bridge Township, filed.

DATE	NR.	PROCEEDINGS Judge Debevoise Civil 83-89 Civil Docket Continuation Sheet
3-10-83	27	Affidavit of Steven J. Tripp, filed.
3-10-83	28	Affidavit of service of consent order extending time to answer, answer and affidavit of Steven J. Tripp, filed.
3-14-83	29	Notice of motion of American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the Essex County Board of Rabbis, the New Jersey Association of Reform Rabbis, the Union of American Hebrew Congregations (New Jersey-West Hudson Valley Council) and the United Synagogues of New Jersey for leave to appear as amicus curiae returnable 3-14-83 and certificate of service, filed 3-11-83. (Statement in lieu of brief)
3-14-83	30	Certification of Rabbi Peter E. Kasdan, filed 3-11-83.
3-15-83	31	Consent Order extending time for defendant Old Bridge Township Board of Education to answer the complaint to 3-31-83, filed 3-14-83. (Debevoise) Notice Mailed.
3-16-83		Hearing on motion of defendants Alan J. Karcher and Carmen A. Orechio for an order suppressing or limiting plaintiffs right to propound interrogatories or take certain depositions. Ordered motion granted in part and denied in part. Order to be submitted. (Debevoise) (3-14-83)
3-16-83		Hearing on motion of the American Jewish Congress for leave to intervene as amicus curiae. Ordered motion granted. Order to be submitted. (Debevoise) (3-14-83)
4- 7-83	32	Order granting motion of the American Jewish Committe, the Anti-Defamation League of B'nai B'rith, the Essex County Board of Rabbis, the New Jersey Association of Reform Rabbis, the Union of America Hebrew Congregations and the United Synagogues of

DATE	NR.	PROCEEDINGS Judge Debevoise Civil 83-89
		N.J. for leave to appear as amicus curiae, filed 3-15-83. (Debevoise) Notice mailed.
4- 8-83	33	*Transcript* of hearing on motion taken 3-14-83, filed 3-16-83.
4- 8-83	34	Notice of motion of defts. Cooperman and N.J. Department of Education to quash notice to take deposition scheduled for 4-15-83, for protective order, ret. 5-23-83, filed 4-7-83. (Brief submitted)
4- 8-83	35	Affidavit of Robert Swissler in support of motion to quash and for protective order, filed 4-7-83.
4- 8-83	36	Affidavit of Saul Cooperman in support of motion for protective order, filed 4-7-83.
4- 8-83	37	Affidavit of service of brief, notice of motion to quash, affidavit of Cooperman and Swissler, and order, filed 4-7-83.
4-20-83	38	Notice of Motion of plaintiffs for an order granting motion *in limine* seeking to admit into evidence copies of news articles as appended hereto reflecting public perception of the N.J. Minute of Silence Act and statements made by various legis. concerning that Act, ret. 4-20-83 and affidavit of service. (Brief submitted)
4-22-83		Hearing on in limine motion of plaintiff for an order permitting admission of certain newspaper articles. Ordered motion granted. Order to be submitted. (Debevoise) (4-20-83)
4-22-83		Hearing on motion of defendants for certification of decision for appeal. Ordered motion denied. (Debevoise) (4-20-83)
4-25-83	39	*Transcript* of hearing on motions taken 4-20-83, filed 4-22-83.
4-28-83	40	Order granting the American Jewish Congress leave to intervene as amicus curiae and leave to file a brief and make oral argument, filed 4-26-83. (Debevoise) Notice Mailed.

DATE	NR.	PROCEEDINGS Judge Debevoise Civil 83-89
5-25-83		At call for hearing on motion of defendants Cooperman & N.J. Dept. of Education to quash notice to take deposition and for protective order, Court indicated motion withdrawn. (Debevoise) (5-23-83)
8-19-83	41	Affidavit of Jack Kanthal, filed 8-18-83.
8-19-83	42	Affidavit of Edward F. Lamb, filed 8-18-83.
8-19-83	43	Notice of motion of the Associated Press to Quash subpoena, returnable 9-7-83, and affidavit of service, filed 8-18-83. (Brief Submitted)
9- 7-83	44	Order quashing subpoenas served upon the Associated Press, filed. (Debevoise) Notice mailed.
9-13-83		Hearing on motion of Associated Press to quash certain subpoenas. Ordered motion granted. (Debevoise) (9-7-83)
9-13-83		*Trial without a jury moved* before Hon. Dickinson R. Debevoise. (9- Trial adjourned to 9-14-83.
9-14-83		Trial without a jury continued. (Debevoise) (9-14-83) Trial adjourned to 9-15-83.
9-15-83		Trial without jury continued. (Debevoise) (9-15-83) Trial adjourned to 9-16-83.
9-16-83		Trial without jury continued. (Debevoise) (9-16-83) DECISION RESERVED.
9-28-83	45	*Transcripts* of trial held on 9-15-83 and 9-16-83, filed. (Volumes 3 and 4)
10-24-83	46	Opinion filed. (judgment for plaintiffs; no costs allowed to any party)
11-15-83	47	Judgment granted for plaintiffs, without costs filed 11-10-83. (Debevoise) Notice Mailed.
12- 2-83	48	Notice of motion of plaintiffs for order setting aside in part Court's opinion filed 10-24-83 and modifying judgment filed 11-10-83, returnable 12-27-83, filed 11-28-83. (brief submitted)

DATE	NR.	PROCEEDINGS Judge Debevoise — Civil 83-89
12- 6-83	49	Proof of service of copy of notice of motion to reconsider and memorandum of law, filed 12-5-83.
12-14-83	50	Notice of appeal of defendants, Alan J. Karcher, New Jersey General Assembly, Carmen A. Orechio and New Jersey Senate filed 12-9-83 at 8:30 A.M. USCA 83-5890
12-14-83		Copies of notice of appeal sent to USCA and Pellettieri, Rabstein and Altman, Alfred E. Ramey, Jr., D.A.G., Hannoch, Weisman, Stern, Besser, Berkowitz & Kinney, Wilentz, Goldman & Spitzer, R. Joseph Ferenczi, Esq.
12-15-83	51	Notice of motion of defendants, Alan J. Karcher, New Jersey General Assembly, Carmen A. Orechio and New Jersey Senate for extension of time to file notice of appeal, returnable 1-9-84 and proof of service filed 12-13-83.
1- 3-84	52	Certification of Valarie Karaska filed 12-29-83.
1-11-84		Hearing on motion of plaintiffs for order setting aside in part Court's opinion filed 10-24-83 and modifying judgment filed 11-10-83. Ordered motion setting aside Court's opinion denied. Ordered motion for modification granted as to intervenors. Order to be submitted. (Debevoise) (1-9-84)
1-11-84		Hearing on motion of defendants, Alan J. Karcher, New Jersey General Assembly, Carmen A. Orechio and New Jersey Senate for extension of time to file notice of appeal. Ordered motion denied. (Debevoise) (1-9-84)
1-23-84	53	Affidavit of Anne P. McHugh in support of plaintiffs' application for attorneys' fees and costs filed 1-20-84.
1-23-84	54	Affidavit of Norman I. Cantor for services filed 1-20-84.

DATE	NR.	PROCEEDINGS Judge Debevoise Civil 83-89
1-23-84	55	Affidavit of Jeffrey E. Fogel for services filed 1-20-84.
1-23-84	56	Affidavit of Deborah H. Karpatkin for services filed 1-20-84.
1-23-84	57	Affidavit of Jack D. Novik filed 1-20-84.
1-23-84	58	Affidavit of service of copy of affidavit of Anne P. McHugh, et al. filed 1-20-84.
1-25-84	59	Copy of transcript purchase order re: transcript already on file 1-23-84.
1-25-84	√	RECORD COMPLETE FOR PURPOSE OF APPEAL.
1-30-84	60	Opinion filed 1-25-84. (Debevoise) (attorney fees for plaintiffs)
1-30-84	61	Order amending order filed 11-10-83 by awarding plaintiffs counsel fees and costs against defendant intervenors only, Alan J. Karcher, as Speaker of N.J. General Assembly, the N.J. General Assembly, Carmen A. Orechio, as President of N.J. Senate and the N.J. Senate; denying plaintiffs' application for attorney fees and costs against Dr. Saul Cooperman and N.J. Department of Education, etc., filed 1-26-84. (Debevoise) Notice Mailed.
2- 6-84	62	Letter objections of state defendants to plaintiffs' application for attorney fees and costs filed 2-3-84.
2- 6-84	63	*Transcript* of proceedings held on 12-12-83 filed 2-3-84
2-21-84	64	Notice of appeal of defendants, Alan J. Karcher as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, Carmen A. Orechio as President of the New Jersey Senate and the New Jersey Senate filed 2-17-84 at 11:46 A.M. (USCA #84-5.
2-21-84		Copies of notice of appeal sent to USCA and Pellettieri, Rabstein & Altman, Hannoch, Weisman, Stern, Besser, Berkowitz & Kin-

DATE	NR.	PROCEEDINGS Judge Debevoise Civil 83-89
		ney, Alfred E. Ramey, Jr., DAG, Wilentz, Goldman & Spitzer, R. Joseph Ferenczi, Esq.
3-12-84	65	Copy of transcript purchase order for hearing held 1-9-84 filed 3-8-84.
3-20-84	66	*Transcript* of proceedings held on 12-12-83 filed (See Doc #63)
3-30-84	67	Opinion filed 3-28-84. (Debevoise) (attorneys' fees for the pltf.)
4- 9-84		CLERK'S NOTE: Transcript needed for appeal was for 12-12-84 as per attorney for deft. Alan J. Karcher as Speaker of the New Jersey General Assembly.
4- 9-84	√	RECORD COMPLETE FOR PURPOSES OF APPEAL.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually;

Plaintiffs,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants.

Civil Action No. 83-89

COMPLAINT

I. JURISDICTION

1. This is a Civil Rights action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and 2202. Plaintiffs seek to redress the declaration under color of state law by the defendants of rights secured to them by the First and Fourteenth Amendments to the United States Constitution and seek to have declared unconstitutional a state statute, to wit P.L. 1982, Ch. 205, which mandates religious observance in the public schools in the State of New Jersey. Plaintiffs contend that P.L.

1982, Ch. 205 results in the deprivation of plaintiffs' rights under the establishment clause of the First Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Jurisdiction of this Court is invoked under 28 U.S.C. § 1331 and 1343(3) and (4). There exists between the parties an actual controversy, justiciable in character, involving a sum in excess of $10,000.00 exclusive of interest and costs.

II. PARTIES

3. Plaintiff, Jean Ross, is the natural parent and guardian of plaintiff, Damon Ross. Plaintiff, Jean Ross, resides at 32 Markam Road, Princeton, New Jersey 08540.

4. Plaintiff, Damon Ross, is the natural child of Jean Ross and resides with his parent at 32 Markam Road, Princeton, New Jersey 08540.

5. Plaintiff, Jeffrey May, is an employee of defendant, Edison Township Board of Education, and resides at 90 Kendall Road, Kendall Park, New Jersey.

6. Plaintiff, Gary Drew, is the parent and guardian of children who attend Sheppard Elementary School, Old Bridge, New Jersey. Plaintiff Gary Drew resides at 36 Stevens Avenue, Old Bridge, New Jersey.

7. Plaintiff, Mark Tulloss, is the natural child of Bonnie Schorske and resides at 21 Lake Drive, Roosevelt, New Jersey.

8. Plaintiff, Bonnie Schorske, is the natural parent of plaintiff Mark Tulloss and resides in Princeton, New Jersey.

9. Plaintiff, Cary Butler, is the natural child of Brenda Butler and resides with his parent at 589-2 Auten Road, Sommerville, New Jersey.

10. Plaintiff, Brenda Butler, is the natural parent of plaintiff Cary Butler and resides at 589-2 Auten Road, Sommerville, New Jersey.

11. Defendant, Saul Cooperman, is the Commissioner of the Department of Education for the State of New Jersey and is charged with enforcing, implementing and establishing guidelines and regulations for legislation adopted by the legislature of the State of New Jersey which concerns the education of children in the State of New Jersey. Defendant Cooperman is charged with implementing, enforcing and promulgating P.L. 1982, Ch. 205 which forms the subject matter of the within litigation.

12. Defendant, Edison Township Board of Education, is a duly ceritified governmental subdivision of the Township of Edison charged with the responsibility of implementing and enforcing State statutes and regulations governing education in the public schools in the Township of Edison. Defendant, Edison Township Board of Education, has implemented P.L. 1982, Ch. 205 in all public schools within its jurisdiction.

13. Defendant, Old Bridge Township Board of Education, is a duly certified governmental subdivision of the Township of Old Bridge charged with the responsibility of implementing and enforcing State statutes and regulations governing education in the public schools in the Township of Old Bridge. Defendant, Old Bridge Township

Board of Education, has implemented P.L. 1982, Ch. 205 in all public schools within its jurisdiction.

III. STATEMENT OF FACTS

14. P.L. 1982, Ch. 205 was passed by the General Assembly of the State of New Jersey on May 18, 1982. The bill was passed by the New Jersey Senate on October 18, 1982. Governor Kean vetoed the bill on December 6, 1982. Governor Kean's veto was overridden by the General Assembly on December 13, 1982 and by the Senate on December 16, 1982. [A copy of P.L. 1982, Ch. 205 is attached hereto and incorporated herein].

15. On December 17, 1982, defendant, Dr. Saul Cooperman, Commissioner of the Department of Education, issued a Memorandum to all County Superintendents concerning the implementation of P.L. 1982, Ch. 205. [A copy of that memorandum is attached hereto and incorporated herein]. Defendant Cooperman's office adopted the position that no regulations or implementing guidelines would be supplied to local school districts, principals or teachers: "[T]he statute should be permitted to speak for itself."

16. Plaintiff, Damon Ross, is ten years of age and a student in the Fifth Grade at Riverside Public School. Riverside Public School is an elementary school within the Princeton Regional School District. The Princeton Regional School District has not yet implemented P.L. 1982, Ch. 205. Plaintiff Damon Ross, however, is threatened with enforcement of P.L. 1982, Ch. 205 and objects to its mandate as a matter of conscience. Plaintiff, Damon Ross, does not want to be forced to observe the moment of silence established and mandated by P.L. 1982, Ch. 205.

17. Plaintiffs, Jean Ross, Gary Drew, Brenda Butler and Bonnie Schorske, as parents and natural guardians of their respective children, object to their children being forced to comply with the mandate of P.L. 1982, Ch. 205. Plaintiffs make this objection based upon conscience and in the interests of their children as parents.

18. Plaintiff, Jeffrey May, is a full time, tenured faculty member of the Edison Township Regional School District. Plaintiff May teaches at John P. Stevens High School, Edison, New Jersey which is a part of the public school system maintained and operated by the defendant Edison Township Board of Education.

19. On or about December 17, 1982, plaintiff May voiced his objections to enforcing, participating in or requiring students to participate in the observance mandated by P.L. 1982, Ch. 205. Those objections were voiced to Principal Harold R. Alley. Similar objections were expressed by Mr. May to Deputy Superintendent of Schools for Edison Township, Dr. Joseph Kreske. Plaintiff May asked Dr. Kreske to be relieved of any responsibility as a teacher for implementing, participating in or abiding by the directive of P.L. 1982, Ch. 205. This request was refused.

20. On December 22, 1982, plaintiff May received a memo to all faculty from Principal Alley. The memo directed all faculty and students to participate in the moment of silence as mandated by P.L. 1982, Ch. 205. On that same date plaintiff told Mr. Alley that he would not abide by the directive for the reason that he believed that it violated his conscience, his personal philosophical beliefs, and that it was unconstitutional.

21. Plaintiff May has refused to lead or participate in any observance of P.L. 1982, Ch. 205. Plaintiff May does not intend to discipline any student who refuses to participate in said observance.

22. Plaintiff May has been threatened with disciplinary proceedings by a representative of defendant, Edison Township silence as mandated by P.L. 1982, Ch. 205. On that same date plaintiff told Mr. Alley that he would not abide by the directive for the reason that he believed that it violated his conscience, his personal philosophical beliefs, and that it was unconstitutional.

23. Plaintiff May has refused to lead or participate in any observance of P.L. 1982, Ch. 205. Plaintiff May does not intend to discipline any student who refuses to participate in said observance.

24. Plaintiff May has been threatened with disciplinary proceedings by a representative of defendant, Edison Township Board of Education, if he does not comply with P.L. 1982, Ch. 205 and the memo issued by Principal Alley. [A copy of that memo is attached hereto and incorporated herein].

25. Plaintiff May is currently under a threat of suspension for what he believes to be the valid exercise of his constitutional rights as well as the protection of the rights of his students.

26. The defendant, Commissioner of Education, has not and does not intend to supply local school districts with implementing guidelines and/or regulations.

27. School districts throughout the State of New Jersey have elected to implement P.L. 1982, Ch. 205 in a

variety of ways ranging from no observance or implementation to requesting that students stand for a moment of silent prayer.

IV. CAUSES OF ACTION

28. Plaintiffs have certain constitutionally protected rights under the First Amendment to the Constitution to freely practice their religious beliefs in the manner in which they want to but in no event to have the State impose upon them a mandated moment of meditation, prayer, contemplation or silence. Defendants' implementation and enforcement of P.L. 1982, Ch. 205 violates the Establishment Clause of the First Amendment to the U.S. Constitution.

29. Defendants' adoption of the policy reflected in P.L. 1982, Ch. 205 violates plaintiffs' rights under the due process clause of the Fourteenth Amendment in that the discretion with respect to how, when and where P.L. 1982, Ch. 205 is to be implemented has been left in the hands of individual school districts, principals and teachers, resulting in uneven, disparate and discriminatory enforcement of P.L. 1982, Ch. 205.

30. P.L. 1982, Ch. 205 is void on its face in that it fails to apprise superintendents, principals, faculty and students of what is proscribed and legislated therein all in violation of the First and Fourteenth Amendments to the U.S. Constitution.

31. P.L. 1982, Ch. 205 is in violation of Article III, Section I of the New Jersey Constitution which mandates that the powers of government shall be divided among

the three distinct branches of government: the legislative, executive and judicial.

32. Plaintiffs have suffered and continue to suffer immediate and irreparable harm by defendants passage and/or implementation of P.L. 1982, Ch. 205 and enforcement thereof in that:

(a) Plaintiffs have been precluded from the valid exercise of their rights pursuant to the First Amendment of the Constitution;

(b) Defendants threats of disciplinary proceedings have created an intimidating atmosphere in an effort to prevent plaintiffs from the valid exercise of their rights pursuant to the First Amendment.

33. Plaintiffs have no adequate remedy at law and are likely to prevail on the merits unless the relief herein demanded is granted, and plaintiffs will continue to suffer irreparable injury if that relief is not forthcoming.

WHEREFORE, plaintiffs pray that this Honorable Court do as follows:

(a) Assume jurisdiction of the within matter;

(b) Enter an Order declaring P.L. 1982, Ch. 205 as unconstitutional on its face and as applied contrary to the provisions of the First and Fourteenth Amendments to the Constitution;

(c) Enter an Order to temporarily and permanently enjoin defendants herein from enforcing and/or implementing P.L. 1982, Ch. 205; and

(d) Enter an Order awarding plaintiffs all attorneys fees and costs pursuant to 42 U.S.C. § 1988.

PELLETTIERI, RABSTEIN AND ALTMAN
13 W. Front Street
Trenton, NJ 08604

On Behalf of the American Civil Liberties Union of NJ

/s/ Richard M. Altman

(Exhibit next to Complaint)

ASSEMBLY, No. 1064

STATE OF NEW JERSEY

INTRODUCED MARCH 8, 1982

By Assemblymen ZANGARI, PATERNITI, HERMAN, Assemblywoman PERUN, Assemblymen DEVERIN, OTLOWSKI, PELLY, HENDRICKSON, COWAN, JANISZEWSKI, NAPLES, Assemblywoman COSTA, Assemblymen PELLECCHIA, GIRGENTI, RILEY, MARSELLA, DORIA, WATSON, Assemblywoman GARVIN, Assemblymen BOCCHINI, PATERO, DOYLE, KARCHER, MATTHEWS, CHARLES, BRYANT, PANKOK, VAN WAGNER, THOMPSON, VISOTCKY, BROWN, JACKMAN, FLYNN, BENNETT, T. GALLO, SHUSTED, CHINNICI, ROCCO, SCHUBER, KOSCO, MARKERT, Assemblywoman WRIGHT, Assemblymen FRANKS, ROD, MUZIANI, MEYER, HAINES, WOLF, KAVANAUGH, SMITH, PALAIA, MILLER, KELLY, GORMLEY and LITTELL

Referred to Committee on Education

AN ACT to allow students of public schools to participate in a *1 minute period of silence* before the opening of

each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

2. This act shall take effect immediately.

(Exhibit next to Complaint)

STATEMENT

This bill allows each student to participate in a 1 minute perior of voluntary silence to be used solely at the discretion of the individual student.

To: County Superintendents and EIC Directors

Date: December 17, 1982

Message: *For relay to Local District Superintendents*

Superintendent will be provided with a copy of Assembly Bill 1064 for transmission to local districts without comment.

Statute should be permitted to speak for itself. Text as follows: "Be it enacted by the State and General Assembly of the State of New Jersey:

> Principals and teachers in each public elementary and secondary school of each school district in this state shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student before the opening exercise of each

school day, for quiet private contemplation or introspection."

This action is to take effect immediately.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,

Plaintiffs,

v.

DR. SAUL COOPERMAN, Comissioner of the Department of Education, et al.,

Defendants.

Civil Action No.

AFFIDAVIT OF BRENDA BUTLER

STATE OF NEW JERSEY)
) ss.:
COUNTY OF SOMERSET)

BRENDA BUTLER, of full age, being duly sworn, according to law, upon her oath, deposes and says:

1. I am the natural parent and guardian of Cary Butler who is a student in the Twelfth Grade at Hillsborough High School.

2. I have read and reviewed Cary's affidavit and know the facts stated therein to be true. I agree with Cary now and I did so upon the passage of this bill and its implementation, that neither prayer nor religion has any place in the public schools. This matter was discussed in our home with Cary and I stand behind his right to express his feelings, his beliefs and his philosophical and political convictions on this subject.

3. I see no educational purpose to this law and fail to see what benefit can be derived for my son by enforcing it against him.

/s/ Brenda Butler

January 10, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,
Plaintiffs,
v.
DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al.,
Defendants.

Civil Action No.

AFFIDAVIT OF CARY BUTLER

STATE OF NEW JERSEY)
) ss.:
COUNTY OF SOMERSET)

CARY BUTLER, being seventeen (17) years of age and knowing and understanding what it means to tell the truth, deposes upon his oath and states as follows:

1. My name is Cary Butler and I reside at 589-2 Auten Road, Sommerville, New Jersey.

2. I am 17 years of age and I am in the Twelfth Grade at Hillsborough High School, which is part of Hillsborough Township School District.

3. I first became aware of the implementation of Assembly Bill 1064 through discussion in my home with my mother, Brenda Butler. My mother and I both opposed the passage of this bill and agreed with Governor Kean concerning his veto.

4. On December 22, 1982, the law was implemented in our school. The school principal, Mr. Spaeth, read the law over the loudspeaker when I was in my homeroom at the beginning of the day. Once the law was read, we were directed to participate by the principal and to sit for one moment of silence and to be perfectly quiet and still.

5. I asked my teacher whether or not I could go to the office since I did not choose to participate in this observance and because I interpreted the law to read and to mean that is was discretionary or voluntary with each individual student. My teacher said that I would have to go to the office and that determination would have to be made there.

6. I left the classroom and I was walking down the hall and was directed to stop by another teacher in the hallway who told me to stand still and to be quiet because the moment of silence was being observed. I said, "I am not sitting or standing in school and praying." I continued on down the hallway to the principal's office. Again I was directed to be quiet by this teacher. The principal came out of his office and began yelling at me: "This is the law," he said, "I didn't make the law, I have to enforce it; you must obey it." I replied that I interpreted

the law to mean that I had a choice as to whether or not I wanted to participate in this moment of silence and I told the principal that I chose not to. I told him "You are not going to make me sit in school and pray." The principal took down my name.

7. Later that day I was called down to the office of the vice-principal. I was charged with insubordination for failing to stop when directed to do so by the teacher in the hallway earlier that morning. I was suspended from school in accordance with our disciplinary procedures. I objected to the suspension and I told the vice-principal that I did not think it was fair under the circumstances. I then went to the principal and explained to him that the suspension was unfair under the circumstances because I was only exercising my rights under the law and my freedom of conscience as I understood it. The principal told me that I would have to go to the superintendent and said: "I agree with you, I don't say it's right or wrong, but that's the law."

8. A day later, when I was sitting in the disciplinary room where suspended students are sent, I was told by the vice-principal that my interpretation of the law was wrong and that I had "no choice" in the matter. We argued back and forth on the issue but the suspension was continued in effect.

9. On December 23, 1982, after my parents contacted the school and the ACLU, I was permitted the privilege of leaving homeroom during the moment of silence and going to the principal's office. I asked the principal whether or not this procedure would be made available to other students and announced to them. He said "No, they

would not announce it, but would rather handle complaints like this on a case-by-case basis."

10. I go to school for an education. I am not religious at all. I feel that the school has no right to enforce this law and to direct me to participate in what I consider to be a religious service or observance. I see this as a first step in the direction of bringing full scale religion back into the schools. It is wrong and as a matter of conscience I am opposed to it.

/s/ Cary Butler

January 10, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,
Plaintiffs,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al.,
Defendant.

Civil Action No.

AFFIDAVIT OF MARK TULLOSS

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MONMOUTH)

MARK TULLOSS, being thirteen (13) years of age and knowing and understanding what it means to tell the truth, deposes upon his oath and states as follows:

1. My name is Mark Tulloss, I reside at 21 Lake Drive, Roosevelt, New Jersey.

2. I am a student in the Eighth Grade at Roosevelt Junior High School in Roosevelt, New Jersey.

3. In December, shortly before Christmas, I was made aware of the fact that the State legislature had passed a law directing that the children in public schools participate in a moment of silence. I objected to the requirement that I participate in this moment of silence. Most of the other students in my class objected to participating in it as well.

4. My objections are based upon the fact that I feel this is an attempt to get prayer back into the public schools. I feel that if I wanted to pray in school I would attend a parochial school of my choosing. I don't feel that the State legislature should force upon anyone opinions which are not derived from scientific thought and the scientific process. The purpose of school is education not religious training. I see no educational benefit in prayer or this moment of silence.

5. Our class discussed this bill at great length with our teacher. We have opted not to participate in the moment of silence. Although other teachers might insist that the students participate, our did not.

/s/ MARK TULLOSS

January —, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,
Plaintiffs,
v.
DR. SAUL COPPERMAN, Commissioner of the Department of Education, et al.,
Defendants.

Civil Action No.

AFFIDAVIT OF JEAN ROSS

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MERCER)

JEAN ROSS, of full age, being duly sworn, according to law, upon her oath, deposes and states as follows:

1. I am the natural parent and guardian of Damon Ross, who resides with me at 32 Markam Road, Princeton, New Jersey.

2. My son Damon is 10 years of age and attends the Fifth Grade of the Riverside Elementary School. Riverside is a part of the Princeton Regional School District.

3. As Damon's parent, I object strongly to his participation in any religious observance conducted in the public schools. I have contacted the Superintendent's Office for the Princeton Regional School District in order to find out what intentions, if any, Princeton has with respect to Assembly Bill 1064. In December, I was told that the bill had not been implemented and that the schools in the Princeton Regional School District were awaiting direc-

tion from the Department of Education. In January, I was told by Mr. Houston, the Superintendent, that the Princeton schools would not implement the law without further clarification from the Department of Education.

4. I have discussed this issue with my son Damon and he objects to being forced or intimidated into participating in any religious observance. He perceives, as do I, the moment of silence or contemplation and introspection to be one suggestive of prayer and he objects to any participation for the same reasons that I do. We consider this a matter of conscience and one which belongs in the home, in the family, or in the church.

5. My son, Damon, reported to me that he initiated a classroom discussion on the subject of the bill and that he appeared to be the only child in his class who was unwilling to participate in a moment of silence.

6. I asked Damon how he would feel if the law was implemented and he said he "would not like it." I asked: "What would you do?" He replied: "I couldn't do anything because my teacher said that if the school established a rule, I'd have to obey it."

7. Damon has close relatives who are Quakers and observes moments of silence as a religious phenomenon. He identifies silence as a form of prayer based upon his experiences.

8. I consider Damon to be under threat of compliance with this law, once implemented in his school district, through either subtle or direct intimidation. I see no educational purpose to be served by the law and I see no

necessity for it; and I object to the imposition of a religious ritual in the public schools.

JEAN ROSS

January —, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually, et al., Plaintiffs,	Civil Action No.
v.	
DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; et al., Defendants.	AFFIDAVIT OF DR. REVEREND GEORGE YOUNGER

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MERCER)

REVEREND GEORGE YOUNGER, of full age, being duly sworn, according to law, upon his oath, deposes and states as follows:

1. I am the Executive Minister of the American Baptist Churches of the State of New Jersey. In that capacity I am the Chief Administrative Officer of 232 Baptist churches throughout the State of New Jersey.

2. I am theologically trained, having received my Master of Divinity degree from Yale Divinity School, New Haven, Connecticut, and my Doctor of Ministry degree from New York Theological Seminary.

3. I am a member of numerous professional societies and organizations, among them: The American Society of Christian Ethnics, the Association of the Sociology of Religion, the Society for the Scientific Study of Religion, and the Religious Research Association.

4. I am a professional ethicist and religious researcher who has studied both the theoretical component and the applied or practical component of the concept of prayer in this and other societies. I have reviewed Assembly Bill 1064 and I feel that my theological training and research qualifies me to comment upon this bill both in theory and in practice.

5. Although A-1064 purports to allow students in the public schools in the State of New Jersey to utilize one minute of silence for whatever purpose they might chose, as a practical matter many of those same students will feel compelled to pray. The reasons for this are rooted in the fact that many religious sects require their members to engage in some outward manifestation symbolic of the act of prayer. For example, a Moslem is required to kneel and bow to the east when praying; a Roman Catholic is expected to fold his or her hands in an ele-

vated fashion; a Charismatic Christian, whether a Roman Catholic or an Evangelical Protestant, also raises his or her hands. Many Protestants feel compelled to bow their heads and close their eyes. These are just some examples of the different cultural approaches employed by institutional religion in this society. In our culture, prayer frequently has symbolic outward manifestations and because of these manifestations, students who chose not to engage in prayer and to utilize this "moment of silence" for some other purpose will be noticeable—not only to the students praying but to the teacher or leader responsible for overseeing this moment. There will be a natural distinction drawn in the classroom, leaving many youngsters self-conscious about their activities during this mandated observance.

6. How the teacher or leader utilizes this moment is, of course, critical and will vary from individual to individual. Many teachers themselves will engage in prayer; many will express or engage in outward manifestations of that activity if it is required or expected by their religious denominations. These teachers could then impose a worshiplike atmosphere on the moment of silent meditation or contemplation, particularly so where students are required to stand in group observation. A leader who himself or herself engages in prayer will naturally send a cue or signal to students with respect to what he or she thinks ought to be done with that moment of silence. The younger the child the more receptive he or she will be to that cue. That same teacher may even criticize a student or students

who are not participating in the manner in which the teacher feels is appropriate to the mandate.

7. The phenomenon of contemplation referred to in Assembly Bill 1064 implies an activity where one meditates or thinks about some external subject. One of the theologically accepted definitions of contemplation is prayer. Both meditation and contemplation in our society have a religious significance. Contemplation needs an object. Contemplation carries with it the implicit understanding that one is not to think of one's self or one's own particular fate but rather to contemplate or consider something external to the self. Introspection, on the other hand, implies a self-reflective task, i.e. evaluating, re-evaluating, considering or re-considering conduct by the self. Both of these concepts, introspection and contemplation, carry with them a religious connotation and significance in our culture.

/s/ REVEREND GEORGE YOUNGER

January 5, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually, et al.,

Plaintiffs,

v.

DR SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; et al.,

Defendants.

Civil Action No.

AFFIDAVIT OF REVEREND DUDLEY E. SARFATY

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MERCER)

REVEREND DUDLEY E. SARFATY, being of full age and duly sworn, upon his oath, deposes and states as follows:

1. I am Associate General Secretary to the New Jersey Council of Churches located at 116 North Oraton Parkway, East Orange, New Jersey.

2. I am an ordained Presbyterian minister having received my Bachelors and Masters of Divinity at Union Theological Seminary, New York, New York. I am a member of the Presbytery of the Palisades and I have pastored in New York and New Jersey.

3. As Associate General Secretary to the New Jersey Council of Churches my duties include legislative monitoring and reporting on church related issues. In that ca-

pacity I monitored the legislative sessions related to Assembly Bill 1064. I attended both the Assembly and Senate sessions related to the override of the veto of that bill. Since I am responsible for reporting back to the Secretary of the New Jersey Council as well as affiliates on those issues of concern and interest to the church, I took notes reflective of the debate and discussion which occurred by and between members of the legislature.

4. It was clear from the remarks made by the proponents of Assembly Bill 1064 that the purpose, objective and intent of this legislation is to bring prayer back into the schools. The remarks made in the Assembly and Senate by the proponents of 1064 reveal that these legislators perceived prayer as a potential instrument of social control; an instrument which should be reintroduced into the public schools of this State in order to elevate the moral fiber of New Jersey students. Although I cannot remember all of the comments and remarks made by proponents of the bill some which stand out and which reveal clearly the intent of the legislature in passing this bill are as follows:

(1) Assemblyman Adubato expressed the view that he hoped that Assembly Bill 1064 would eventually lead to financial aid to parochial schools. Assemblyman Adubato considered the bill a good step in that direction.

(2) Senator Dumont expressed the view that he was in favor of prayer because he was against crime and disruption in our society, and he thought that Assembly Bill 1064 would alleviate or ameliorate these social problems.

(3) Senator Cardinale told the legislature " . . . we know what the people want," and that there was

no question as to whether or not he was the servant of the people or of the Court. Senator Cardinale very candidly admitted that Assembly Bill 1064 was a compromise bill, one which offered some consolation to those who wanted a formal prayer reintroduced in the public schools.

(4) Senator Brian Kennedy conceded that his motivation in voting for the bill was that he wanted prayer back in the public schools. Senator Kennedy remarked: "Nobody knows what the kids are doing, but I hope they are praying."

5. These are just some of the remarks which I can recall being made by those legislators who advanced and promoted the bill. It would be fair to say that almost the entire legislative debate on this bill focused on whether or not A-1064 was a "prayer bill". The discussion led me to strongly infer that the primary purpose of this bill was to provide a constitutional opportunity for private prayer in the public schools. Educational goals and objectives, as normally understood by members of the teaching profession, were not discussed. I recall no oral discussion concerning the educational merits of the enterprise.

/s/ REVEREND DUDLEY E. SARFATY

January 4, 1983

(Notary omitted in printing)

ALPER,

Plaintiff,

vs.

COOPERMAN, et al.,

Defendant.

STATE OF NEW JERSEY
COUNTY OF MERCER

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

DOCKET NO.

Civil Action

AFFIDAVIT OF JEFFREY MAY

JEFFREY MAY being of full age and duly sworn upon his oath deposes and says as follows:

1. I, Jeffrey May, reside at 90 Kendall Road, Kendall Park, New Jersey, and I am a tenured faculty member at John P. Stevens High School, Edison, New Jersey. John P. Stevens High School is within the Edison School District and I have been with that school district for nine consecutive years as a full time faculty member.

2. Prior to my tenure with the Edison School District, I was employed as a full time faculty member with various private schools for five years. During my entire teaching career, I have taught a variety of grades, among them fifth, sixth, eighth, ninth, eleventh and twelfth grades. I am currently teaching physics and physical sciences to eleventh and twelfth grade students.

3. I am not a member of any organized institutional religion and I would describe myself as an agnostic.

4. On December 17, 1982, I became aware of the passage of Bill A-1064 on the veto override. I immediately

went to see Principal Harold R. Alley to discuss with him my objections to participating in anyway whatsoever with the observance and/or enforcement or implementation of this Bill in my classroom. Mr. Alley informed me that he knew nothing about the Bill, and that I should not be concerned until that time when he had an opportunity to review it and to make a full determination as to what the public schools in Edison Township would do.

5. On December 17, 1982, after discussing the matter with Principal Alley, I contacted the Deputy Superintendent of Schools for Edison Township, Dr. Joseph Kresky. I asked Dr. Kresky to be relieved of any responsibility as a teacher for implementing, participating in or abiding by the directive of Assembly Bill 1064. Dr. Kresky refused this request.

6. On December 22, 1982, I received in my faculty mailbox a memo "To All Faculty Members" from Mr. Alley, Principal of J. P. Stevens High School. The memo directed all faculty and students to participate in a moment of silence as directed by the State Legislature in Assembly Bill 1064. Mr. Alley confirmed for me the fact that I was required as a faculty member to participate in and to direct students to participate in this observance.

7. On that same date, December 22, 1982, I informed Principal Alley that I did not intend to and would not comply with his directive and the directive of the State Legislature to join in this religious observance. My reasons for non-compliance were expressed and told to Principal Alley before school started. Those reasons were and continue to be as follows:

(1) I consider this law to be unconstitutional and a violation of the First Amendment to the Constitution respecting establishment of religion;

(2) This law violates my conscience and my personal philosophical beliefs;

(3) The Attorney General and the Governor of the State of New Jersey consider this law to be unconstitutional; and I believe that to direct and/or discipline students with regard to this bill is to engage in an illegal and unlawful act.

8. In spite of my objections as articulated to Principal Alley, I was directed to participate in the moment of silence. I reiterated to Principal Alley my objections and that I consider this mandate by the Legislature to be unconstitutional, illegal, and in violation not only of my conscience but the rights of students in the public schools of New Jersey.

9. I interpret and perceive Assembly Bill 1064 as requiring a religious service or observance in the classroom.

10. It has been my experience as a teacher of many children of many ages over the past 14 years that such an observance is and will be perceived by some youngsters as a religious service. As an educator and teacher, I see absolutely no educational benefit to be derived from the requirements established in Assembly Bill 1064. As a teacher there are various points during a day when I might ask a class to calm down, sit quietly and consider and reflect upon various concepts in physics that we might be discussing. For the State Legislature to direct every student across the State of New Jersey at the beginning of every day to

engage in a moment of silence without regard to whether or not the particular student, class, or school need that moment of silence at that particular time is irrational and meaningless from an educational point of view. There may well be time when students ought to quiet down, contemplate whatever has been discussed in class or whatever has transpired in the classroom but these moments should be left to the discretion of the individual teacher as he or she deems fit.

11. I feel very strongly that this law violates my rights as a citizen of the United States, my students' rights as citizens of the United States and it is unconscionable for me to require others to participate in this directive and to discipline them for failure to do so. As a teacher, I am required to discipline any student who fails to abide by the regulations issued through the principal's office and the School Board of Edison Township. I see this Bill as intending a religious purpose, initiating a religious service and totally inappropriate and meaningless to the educational process.

12. I have been threatened with disciplinary proceedings by the School District, and with possible suspension for what I believe to be the valid expense of my constitutional rights. [See Exhibit A attached hereto.]

/s/ Jeffrey May

December 30, 1982

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,	)	Civil Action No.
Plaintiffs,	)	
v.	)	AFFIDAVIT OF RITA ROTHENBERG
DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al.,	)	
Defendants.	)	

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MERCER)

RITA ROTHENBERG, being of full age and duly sworn, upon her oath, deposes and states as follows:

1. I reside at 233 Victoria Court, Matawan, New Jersey and I have a son, Joshua Rothenberg, who is a first grade student at Strathmore Elementary School in Matawan.

2. The Strathmore Elementary School is a part of the Matawan-Aberdeen Regional School District.

3. On or about December 21, 1982, just before the Christmas recess, I was informed through my son, Joshua, that the students in his class were asked to sit down in their seats for a moment of silence. Joshua was apparently referring to Assembly Bill 1064. My husband and I discussed

this with Joshua and we told him that it was our wish that he not observe or participate in that activity. Joshua began to cry and was very upset at the prospect of being singled out from the other children.

4. My husband is a elementary school teacher in the New York City school system and was formerly a member of the school board for the Matawan-Aberdeen Regional School District. Neither he nor myself see any educational purpose in Assembly Bill 1064. In fact, I perceive it as mandating prayer or religious observance in the public schools, a practice which I object to and in which I do not want my son Joshua to participate. Both my husband and I feel that prayer and/or religious observance of this sort belongs either in the home or in a church or synagogue of one's choice but not in the public schools.

5. Although we feel very strongly as a matter of constitutional principal and conscience that this practice violates our rights and the rights of our son, Joshua, it is very difficult, if not impossible, as a parent to ask a very young child to set himself apart and to leave the classroom when this activity is taking place. We do not want Joshua to participate in this observance, but on the other hand we are fully aware of the peer pressure placed upon him to do so, and we are sensitive to his feelings that he will be singled out if he does not participate.

6. This kind of activity whether it is called prayer, meditation or contemplation, belongs in the home, the family or a church or synagogue but not in the public schools when it creates this kind of tension in children and forces

parents to compromise their political and philosophical beliefs.

RITA ROTHENBERG

January —, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY May, individually, et al., Plaintiffs, v. DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al., Defendants.	)	Civil Action No. AFFIDAVIT OF GARY DREW

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MIDDLESEX)

GARY DREW, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am Gary Drew and I reside at 36 Stevens Avenue, Old Bridge, New Jersey.

2. I have two children who attend public school in the Old Bridge Township School District. I have a daugh-

ter, Jamie Drew, who is six (6) years of age and in the First Grade at Shepherd Elementary School. I have another daughter, Dina Drew, who is nine (9) years of age and attends Third Grade at the Shepherd Elementary School. The Shepherd Elementary School is a part of the Old Bridge Township School District.

3. I first became aware of legislation attempting to re-introduce prayer into the public schools through our local school board when it passed an ordinance mandating a moment of silence at the beginning of each school day in the Old Bridge Township School District.

4. At that time I objected as a matter of conscience to the introduction of any such ordinance and opposed its mandate. The matter become moot because the ordinance was overturned by a Federal District Court Judge.

5. Soon thereafter, the State legislature passed Assembly Bill 1064 addressing the same issues. My objections to the Old Bridge ordinance stated apply with equal force to this legislation which has been mandated by our State legislature and which is being implemented in the Shepherd Elementary School which my children attend.

6. My children are being raised in the Roman Catholic faith and my wife and I feel that their religious training and observance belongs either in the home or at church or under the guidance of the parish priest. I do not feel that some teacher in a public school classroom should be permitted to determine how this "moment of silence" is to be used by young and impressionable children. Though many teachers may be prudent and utilize the moment in a way that I would not personally find it offensive, there are others who clearly would not. The law does not provide

for any way in which I might monitor the activities of any given teacher concerning this moment of silence.

7. My wife and I have not registered any formal objection with the School District concerning the moment of silence because of the young age of our children. Our decision to let this ride was based upon our sensitivity to the peer pressure which our children might experience and the hope that this matter will be resolved in court. My wife is opposed to forcing the children to leave the room because she feels that they would find it embarrassing. It creates a dilemma for us as parents, particularly me, because I feel that this is a matter of personal conscience and that my children should not be subjected to any religious observance in the public schools.

8. I consider this law an earnest attempt by the State legislature to re-establish prayer in the public schools and I consider it to be a violation of not only my rights and my children's rights but the rights of others as well.

/s/ Gary L. Drew

January 6, 1983

(Notary omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually;	)	Civil Action No. 83-89
Plaintiffs,	)	
v.	)	ORDER TO SHOW CAUSE
DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,	)	
Defendants.	)	

This matter being opened to the Court by Pellettieri, Rabstein and Altman, attorneys for plaintiffs, Richard M. Altman, Esquire, appearing, upon application for an Order compelling defendants to show cause why a Preliminary and Permanent Injunction should not issue restraining defendants their officers, agents, servants, employees, and successors from enforcing P.L. 1982, Ch. 205, and for an

Order temporarily restraining enforcement of the statute by defendants pending a hearing on the application for Preliminary Injunction and, notice having been given to counsel for defendants, and the Court having reviewed the Verified Complaint of plaintiffs, and Affidavits attached hereto and having heard and considered the language of the statute, Briefs and arguments of counsel; and it appearing therefrom that the challenged Statute, P.L. 1982, Ch. 205, is unconstitutional on its face and as applied in that it violates the First and Fourteenth Amendments to the U.S. Constitution and that immediate and irreparable injury will result to plaintiffs pending a hearing on the application for Preliminary Injunction;

NOW, THEREFORE, it is on this 10th day of January, 1983, ORDERED that defendants show cause before this Court on the 18th day of January, 1983, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the United States Courthouse and Post Office in Trenton, New Jersey, why a preliminary and permanent injunction should not issue restraining defendants, their officers, agents, servants, employees, and successors from enforcing or implementing P.L. 1982, Ch. 205;

IT IS FURTHER ORDERED that defendants submit briefs 1 day prior to the return date of this Order; and

IT IS FURTHER ORDERED that service of a copy of the Complaint and Order, together with supporting papers, shall be permitted to be made by a respresentative or agent of the law firm of Pellettieri, Rabstein and Altman within 2 days hereof; and

IT IS FURTHER ORDERED that for the reasons set forth in a bench opinion, defendants pending a hearing

on the application for a Preliminary Injunction, are enjoined from enforcement of P.L. 1982, Ch. 205; and

IT IS FURTHER ORDERED that defendants shall have leave to move for dissolution or modification of the Temporary Restraining Order contained hereon on 2 days notice to plaintiffs' counsel and

IT IS FURTHER ORDERED that defendants are required to serve upon the attorneys for plaintiffs, whose name and office address appears above, an Answer to the Complaint within twenty (20) days after the service of the within Order, exclusive of the day of service. If defendants fail to answer or appear in accordance with the Rules of Court, judgment by default may be rendered against defendants for the relief demanded in the Complaint. Defendants shall promptly file their Answer or appearance and Proof of Service thereof with the Clerk of the United States District Court for the District of New Jersey, United States Post Office Building, Trenton, New Jersey, in accordance with the Rules of Civil Practice and Procedure.

/s/ Dickinson R. Debevoise

U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually, Plaintiffs, v. DR. SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, Defendants.	Civil Action Civil Action No. 83-89 (DRD) ORDER (Filed January 14, 1983)

This matter being opened to the Court by Pellettieri, Rabstein and Altman, attorneys for plaintiffs, Richard M. Altman, appearing on January 10, 1983, upon application for an Order compelling defendants to show cause why a Preliminary and Permanent Injunction should not issue restraining defendants, their officers, agents, servants, employees, and successors, from enforcing P.L. 1982, Ch.

205, and for an Order temporarily restraining enforcement of the statute by defendants pending a hearing on the application for Preliminary Injunction and, notice having been given to counsel for defendants, and the Court, after having reviewed the Verified Complaint and Affidavits submitted by plaintiffs and after having heard the arguments of counsel, having determined that P.L. 1982, Ch. 205 was unconstitutional in violation of the First and Fourteenth Amendment to the U.S. Constitution and having determined that immediate and irreparable injury will result to plaintiffs pending a hearing on the application for Preliminary Injunction, the Court on January 10, 1983 Ordered, for the reasons set forth in its bench opinion, defendants, pending a hearing on the application for a Preliminary Injunction, enjoined from enforcement of P.L. 1982, Ch. 205; and

It now appearing that a further Order is necessary to preserve the effect of the temporary restraint previously ordered; and

It appearing that the counsel for defendant Dr. Saul Cooperman and for the interveners Assembly and Senate of the State of New Jersey have given their consent to the entry of this further order;

NOW, THEREFORE, it is on this 14th day of January, 1983 ORDERED that defendant Dr. Saul Cooperman, Commissioner of Education is directed to notify the school districts of the State of New Jersey by any means he deems appropriate to effectuate the terms of this Order, that this Court has made an initial determination that P.L. 1982, Ch. 205 is unconstitutional and that a temporary restraint has been issued restraining any further enforce-

ment of that provision by defendants and that pursuant to the further Order of this Court the local school districts of the State of New Jersey, their officers, agents, servants, employees and successors are to immediately cease any further enforcement of P.L. 1982, Ch. 205, pending a hearing for Preliminary Injunction.

/s/ Dickinson R. Debevoise, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et. al.,	)	
Plaintiffs,	)	Civil Action No. 83-89
v.	)	ORDER PERMITTING INTERVENTION
DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al.,	)	(Filed January 18, 1983)
Defendants.	)	

This matter being opened to the Court by Marinari and Farkas, P.A., Lawrence T. Marinari, Esq., appearing, upon application for an Order permitting intervention as direct party defendants by Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio in his representative capacity as President of the New Jersey Senate; and the New Jersey Senate; and it appearing that Pellettieri, Rabstein & Altman, attorneys for the plaintiffs, Irwin Kimmelman, Attorney General of the State of New Jersey, attorney for defendants Dr. Saul Cooperman and the New Jersey Department of Education and Joseph D. Ferenczi, Esq., attorney for Edison Township Board of Education and Wilentz, Goldman & Spitzer, attorneys for the Old Bridge Township Board of Education do not object to the intervention and consent thereto;

NOW, THEREFORE, it is on this 18 day of January, 1983 ORDERED that Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio in his representative capacity as President of the New Jersey Senate; and the New Jersey Senate; be permitted to intervene as direct party defendants in Civil Action No. 83-89.

/s/ Dickinson R. Debevoise, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually;	)	Civil Action No. 83-89
Plaintiffs,	)	ANSWER OF DEFENDANTS ALAN J. KARCHER IN HIS REPRESENTATIVE CAPACITY AS SPEAKER OF THE NEW JERSEY GENERAL ASSEMBLY; THE NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO IN HIS REPRESENTATIVE CAPACITY AS PRESIDENT OF THE NEW JERSEY SENATE; AND THE NEW JERSEY SENATE
v.	)	
DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION; ALAN J. KARCHER, in his representative capacity as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO in his representative capacity as President of the New Jersey Senate; and the NEW JERSEY SENATE,	)	
Defendants.	)	

The defendants, Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio in his representative capacity as President of the New Jersey Senate; and the New Jersey Senate, by way of answer to the plaintiff's complaint, say:

1. Defendants deny the allegations contained in paragraphs 1, 2, 28, 29, 30, 31, 32, 33 of the complaint.

2. Defendants deny having sufficient knowledge or information to form a belief as to the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 of the complaint.

3. Defendants admit the allegations contained in paragraphs 11 and 14 of the complaint.

FIRST AFFIRMATIVE DEFENSE

This Court is without the jurisdiction over the subject matter and the other parties to this law suit.

SECOND AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which the relief can be granted.

THIRD AFFIRMATIVE DEFENSE

The Complaint fails to allege sufficient facts presenting a case of controversy appropriate for Declaratory Judgment.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring this suit.

FIFTH AFFIRMATIVE DEFENSE

This action is barred because the issue is non-justiciable.

SIXTH AFFIRMATIVE DEFENSE

This action is barred by the Political Question Doctrine.

WHEREFORE, the defendants demand:

1. That the complaint filed by the plaintiffs be dismissed;

2. Or that judgment be entered in the defendants' favor and against the plaintiffs;

3. The defendants be awarded such other relief as the Court may deem just and proper.

MARINARI AND FARKAS, P.A.

By /s/ Lawrence T. Marinari
Attorneys for Defendants

Dated: February 18, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,	)	Civil Action No. 83-89
Plaintiffs	)	NOTICE OF MOTION
vs.	)	
DR. SAUL COOPERMAN, et al.,	)	(Filed February 22, 1983)
Defendants	)	

TO: PELLETTIERI, RABSTEIN ALTMAN
13 West Front Street
Trenton, New Jersey 08604
Attorneys for Plaintiffs

PLEASE TAKE NOTICE that on March 14, 1983, at 10:00 a.m. or as soon thereafter as counsel may be heard, counsel for the defendants Alan J. Karcher in his representative capacity as Speaker of the New Jersey Assembly; the New Jersey General Assembly and Carmen A. Orechio, in his representative capacity as President of the New Jersey Senate; and the New Jersey Senate, shall move before the Honorable Dickinson R. Debevoise, Judge, United States District Court for the District of New Jersey for an Order pursuant to the provisions of Rule 26(c) (1) and (4) suppressing or otherwise limiting the plaintiffs' right to propound interrogatories or take depositions of legislators, senators and assembly persons of the intevenor defendants and specifically quashing or otherwise limiting Interrogatory Nos. 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of Interrogatories served by plaintiffs' attorney on intevenor defendants' on or about January 26,

1983; and suppressing or otherwise precluding depositions of Assembly Representatives Deverin, Zingari, Wolf, Adubato, Otlowski, Pelly, Hendrickson, Cowan, Naples, Janiszewski, Costa, Pellecchia, Girgenti, Riley, Marsella, Doria, Watson, Garvin, Bocchini, Patero, Doyle, Karcher, Matthews, Charles, Bryant, Paterniti, Herman, Perun, Pankok, Van Wagner, Thompson, Visotcky, Brown, Jackman, Flynn, Bennett, T. Gallo, Shusted, Chinnici, Rocco, Schuber, Kosco, Markert, Wright, Franks, Rod, Muziani, Meyer, Haines, Kavanaugh, Smith, Palaia, Miller, Kelly, Gormley and Littell and Senators Dumont, Bassano, Haggdorn, Kennedy, Orechio, McManamon, Zane and former Senators Eugene Bedell and William Musto, whose depositions were noticed by plaintiffs' attorney by Notice of Deposition served on intevenor defendants on or about dated January 26, 1983, on the grounds that the Interrogatories and proposed depositions violate the legislative privilege of the New Jersey General Assembly and the New Jersey Senate and the individual legislators thereof and are further designed for the discovery of information which is neither relevant, and/or otherwise admissible in the within action. In support of this motion, defendants will rely upon the brief submitted herewith.

/s/ William W. Robertson

Dated: February 22, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,	)	
Plaintiffs,	)	Civil Action No. 83-89
v.	)	
DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al.,	)	NOTICE OF MOTION
Defendants.	)	

TO: ALFRED E. RAMEY, JR., ESQUIRE
Deputy Attorney General
R.J. Hughes Justice Complex
New Warren & Market Streets
Trenton, New Jersey 08625

LAWRENCE T. MARINARI, ESQUIRE
Marinari and Farkas
1901 N. Olden Avenue Extension
Suite 26A
Trenton, New Jersey 08618

WILLIAM W. ROBERTSON, ESQUIRE
Hannoch, Weisman, Stern, Besser,
Berkowitz & Kinney
744 Broad Street
Newark, New Jersey 07102

STEVEN J. TRIPP, ESQUIRE
Wilentz, Goldman & Spitzer
900 Route 9, Box 10
Woodbridge, New Jersey 07095

R. JOSEPH FERENCZI, ESQUIRE
1863 Lincoln Highway, Box 363
Edison, New Jersey 08818

SIRS:

PLEASE TAKE NOTICE that the undersigned will move before the Court on Wednesday, April 20, 1983 before the Honorable Dickinson R. Debevoise, at the United States District Court, Federal Courthouse & Post Office Building, Newark, New Jersey, for an Order granting plaintiffs' motion *in limine* seeking to admit into evidence copies of news articles as appended hereto reflecting public perception of the New Jersey Minute of Silence Act, P.L. 1982, Ch. 205, and statements made by various legislators concerning that Act.

The undersigned will rely upon the attached affidavit of Anne McHugh, Esquire and plaintiffs' memorandum of law submitted herewith.

PELLETTIERI, RABSTEIN AND ALTMAN
Attorneys for Plaintiffs
/s/ Richard M. Altman

(Proof of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually, et al.,	)	
Plaintiffs,	)	Civil Action No. 83-89
v.	)	
DR. SAUL COOPERMAN, Commissioner of the Department of Education, et al.,	)	AFFIDAVIT OF ANNE McHUGH, ESQUIRE
Defendants.	)	

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MERCER)

ANNE McHUGH, of full age, being duly sworn, according to law, upon her oath, deposes and says:

1. I am an attorney at law of the State of New Jersey associated with the firm of Pellettieri, Rabstein and Altman, Esquires, 13 West Front Street, Trenton, New Jersey, and am the attorney responsible for the handling of the within matter.

2. I bring this motion in order to have the Court address the question of the admissibility of various news articles, many of which have been attached to plaintiffs' appendix in a prior brief submitted to this Court.

3. Those news articles reflect public opinion as well as statements made by various legislators concerning the purpose, intent and import of P.L. 1982, Ch. 205.

4. Counsel for the defendant Legislature would not stipulate to the accuracy of the statements made and objects to their admissibility. Defendants insist upon cross-examining each and every author of these news articles. Plaintiffs will be put to the burden of subpoenaeing dozens of news reporters in order to verify the accuracy of these statements unless articles are admitted with affidavits of verification or as an exception to the hearsay rule.

5. Plaintiffs would ask the Court to accept an affidavit by news reporters attesting to the accuracy of the quotes from various legislators.

6. Plaintiffs have appended to this motion a computer printout reflecting the various articles and quotes which plaintiffs seek to introduce. See Exhibits A, B and C attached hereto. Copies of these articles are attached hereto as well. Plaintiffs are working under severe time constraints in an effort to meet the deadlines established by the Court, and additional news articles may surface in the course of investigation and plaintiffs would ask the Court to consider them even though they are not yet a part of the within motion. Every effort has been made and is continuing to be made to supply to counsel for the defen-

dant Legislature complete and legible copies of all of the news clippings which plaintiffs intend to introduce.

/s/ Anne McHugh

April 18, 1983
(Notary omitted in printing)

(Exhibits next to Aff'd of Anne McHugh dated April 18, 1983)

EXHIBIT A

Date: 12/14/82
Paper: Courier-Post
By-Line: Freiberg, Nancy
Name Quoted: Adubato
Category: Assembly

Quote: He said he believed the bill was constitutional because it was not mandating prayer. Even if it did, he said, it would have his vote. "Prayer never hurt anyone."

Date: 12/14/82
Paper: Bergen Record
By-Line: Shure, Jon
Name Quoted: Adubato
Category: Assembly

Quote: "I would like to see prayer in our schools, and I admit it. I would like to see a Rabbi and a Priest, and then maybe there wouldn't be so many people becoming Moonies."

Date: 12/14/82
Paper: Trenton Times
By-Line: Goodman, Jim
Name Quoted: Adubato
Category: Assembly

Quote: "When I vote for this override, I'll be saying, 'Thank you' to the parochial schools and 'Thank you' to God."

Date: 12/14/82
Paper: Star-Ledger
By-Line: Seidenstein, Robt
Name Quoted: Adubato
Category: Assembly

Quote: "I would like to see prayer in the school and I admit it." Referring to members of religious cults, he said that if priests and rabbies could go into schools maybe "we wouldn't have so many Moonies." He even made an impassioned plea for funding of parochial schools, before adding, "the truth is that this bill does not mandate prayer. It doesn't have one word about prayer."

Date: 12/14/82
Paper: Trentonian
By-Line: Wilson, Tony
Name Quoted: Adubato
Category: Assembly

Quote: "I wish the bill funded private, parochial education, as well as allowing prayer."

Date: 12/16/82
Paper: Star-Ledger
By-Line: Susi & Seidenstein
Name Quoted: Karcher
Category: Assembly

Quote: "An atheist can contemplate the nonexistence of God" if he wants to, he said.

Date: 12/14/82
Paper: Bergen Record
By-Line: Shure, Jon
Name Quoted: Wolf
Category: Assembly

Quote: "Whether we want to hide behind contemplation or reflection, it's prayer," he said in support of the bill.

Date: 12/14/82
Paper: Star-Ledger
By-Line: Seidenstein, Robt
Name Quoted: Wolf
Category: Assembly

Quote: He supported the bill and was blunt in his assessment of the bill, saying, regardless of "whether we

want to hide behind" the use of the term "contemplation" in the bill, "it's a prayer."

Date: 10/19/82
Paper: Phila Inquirer
By-Line: Tollerson, Ernest
Name Quoted: Zangari
Category: Assembly

Quote: "If it's good for all the grown-ups, why shouldn't it be good for my grandchildren?" he asks in referring to the fact that a prayer is offered when he sits down at a banquet and when he takes his seat in the assembly.

Date: 12/3/82
Paper: Bergen Record
By-Line: Shure, Jon
Name Quoted: Zangari
Category: Assembly

Quote: He said he thought he had refined the bill to make it constitutional and that Kean shouldn't have taken Orechio's remarks into account.

Date: 12/14/82
Paper: Bergen Record
By-Line: Shure, Jon
Name Quoted: Zangari
Category: Assembly

Quote: He urged his colleagues to stick with the bill's wording in the override vote and not read into its intent. "This bill is very, very clear—contemplation or introspection." Zangari, who in the past has sponsored bills calling for prayer, only to have them vetoed by former Gov. Byrne, said he was upset that Kean had interpreted the bill as intending prayer.

Date: 3/18/83
Paper: Home News
By-Line: Breslin, Patrick
Name Quoted: Zangari
Category: Assembly

Quote: He knows some other legislators mentioned that students could pray quietly during the moment of silence. But Zangari said prayer was not the intention of

the law—just a possible byproduct. "All they were saying is, 'What is wrong if a child wants to pray?'" Zangari said.

EXHIBIT B

Date: 10/19/82
Paper: Asbury Park
By-Line: Desando, Bob
Name Quoted: Bassano
Category: Senate

Quote: He said he would vote for a bill to amend the Constitution to allow prayer in the public schools. But he said the Zangari bill is the wrong approach. Although the bill only mentions contemplation and introspection, he said its supporters keep talking about prayer. "I keep hearing the word over and over again. And if that's what it's about, then it's unconstitutional. It makes no difference whether you come in the front door or the back door."

Date: 11/2/82
Paper: Bergen Record
By-Line: Warner, Sue
Name Quoted: Cardinale
Category: Senate

Quote: "There is a large group out there that says there should be something else. Not government dictating religious denominations but something akin to respect, some decorum. There should be some statement by government that we're not atheistic, either. The minute of silence is kind of a compromise among the various groups."

Date: 12/17/82
Paper: Bergen Record
By-Line: Feldman & Yerkes
Name Quoted: Cardinale
Category: Senate

Quote: "This bill says the court won't let us do what the people want, and this is the best we can do."

Date: 12/17/82
Paper: Trenton Times
By-Line: Pollack, Jill
Name Quoted: Dumont
Category: Senate

Quote: "I don't see what harm this bill can do, and I certainly see a great deal of good. I don't think we ought to adhere so devoutly to the separation of church and state and forget that there are other things that are good for us."

Date: 12/17/82
Paper: Bergen Record
By-Line: Feldman & Yerkes
Name Quoted: Dumont
Category: Senate

Quote: "Since the decision of the U.S. Supreme Court, we've seen crime increase and become more rampant. Children have become more disruptive. I can't see where the bill would do any harm, and it might do a great deal of good. I don't think we ought to adhere so closely to the separation of church and state that we forget other things are more important."

Date: 10/19/82
Paper: Trenton Times
By-Line: Goodman, Jim
Name Quoted: Dumont
Category: Senate

Quote: Voted for the bill, asserting that there was no difference between a moment of contemplation in the schools and the prayers used at the start of each session of the Senate.

Date: 1/5/83
Paper: Star-Ledger
By-Line: O'Brien, Tim
Name Quoted: Kennedy
Category: Senate

Quote: "Some of them (students) may be praying (during the minute). I hope so, frankly."

Date: 10/19/82
Paper: Asbury Park
By-Line: Desando, Bob
Name Quoted: Kennedy
Category: Senate

Quote: The founding fathers who battled for freedom of religion and its guarantee in the Bill of Rights are probably "spinning in their graves" at seeing how this right has been "twisted."

Date: 12/17/82
Paper: Home News
By-Line:
Name Quoted: Kennedy
Category: Senate
Quote: "Maybe they're praying. Maybe they're not. Who's to know? Maybe they're praying. I hope so."

Date: 12/17/82
Paper: Star-Ledger
By-Line: Seidenstein, Robt
Name Quoted: Kennedy
Category: Senate
Quote: He said he could not understand why some senators were "so afraid" of a moment of silence. He said no one would know what the students would be thinking. "Some of them may be praying, I hope so, frankly."

Date: 10/19/82
Paper: Star-Ledger
By-Line: Piserchia, Mike
Name Quoted: Kennedy
Category: Senate
Quote: He said the framers of the Constitution are probably "turning over in their graves" over the way the opposing lawmakers are interpreting the First Amendment. "I can't see how this bill would be offensive to anyone. Nowhere does it make one mention to the word 'prayer.'"

Date: 12/17/82
Paper: Trenton Times
By-Line: Pollack, Jill
Name Quoted: Kennedy
Category: Senate
Quote: "There is no constitutional ban against prayer in school. The court has interpreted the Constitution as

banning prayer." He said the founding fathers "never believed that our children couldn't take a moment to stand up and meditate, to think about God and religion." He added that perhaps it was time to put the question before the U.S. Supreme Court again, and that "maybe in the future they will say prayer is one thing and separation of church and state is another."

Date: 12/3/82
Paper: Trenton Times
By-Line: Pollack, Jill
Name Quoted: Kennedy
Category: Senate

Quote: "We're all crazy if we think a moment of silence is going to poison or influence our young people. Let the atheists stand there and think about watching television."

Date: 12/17/82
Paper: Star-Ledger
By-Line: Seidenstein, Robt
Name Quoted: Kennedy
Category: Senate

Quote: "Some of them may be praying, I hope so, frankly."

Date: 10/19/82
Paper: Star-Ledger
By-Line: Piserchia, Mike
Name Quoted: Kennedy
Category: Senate

Quote: The framers of the Constitution are probably "turning over in their graves" over the way the opposing lawmakers are interpreting the First Amendment. "I can't see how this bill would be offensive to anyone. Nowhere does it make one mention to the word 'prayer.' "

Date: 10/19/82
Paper: Trenton Times
By-Line: Goodman, Jim
Name Quoted: Kennedy
Category: Senate

Quote: The "Founding Fathers" would be "turning over in their graves" if they could hear anyone arguing against this legislation.

Date: 12/17/82
Paper: Trenton Times
By-Line: Pollack, Jill
Name Quoted: McManimon
Category: Senate
Quote: He said his original vote in favor of the bill brought him one of the "nastiest" letters he has received as a legislator. "If this is what's happening, maybe we need more of this kind of thing."

Date: 10/19/82
Paper: Trenton Times
By-Line: Goodman, Jim
Name Quoted: McManimon
Category: Senate
Quote: "Look what's happened since school prayer was banished." He said the moments of contemplation "would instill a concept of respect" among school children.

Date: 1/5/83
Paper: Bergen Record
By-Line: Fisher, Harvey
Name Quoted: Orechio
Category: Senate
Quote: When the bill was moving through the legislature, Senate President Carmen Orechio, D-Essex, described it as a way of "bringing prayer back into the schools through the front door."

Date: 10/19/82
Paper: Asbury Park
By-Line: Desando, Bob
Name Quoted: Orechio
Category: Senate
Quote: He acknowledged the bill is designed to bring "prayers back into the school through the front door." He said if there were "more prayer and religion" in the school, there would be fewer problems with the young.

Date: 12/3/82
Paper: Star-Ledger
By-Line: Seidenstein, Robt
Name Quoted: Orechio
Category: Senate

Quote: He said the bill would mean "bringing prayer back into the schools through the front door . . . if we did restore prayer in the schools we would have a lot less problems in our classrooms. This bill will not harm any school-age child. Rather, it will restore faith in his creator."

Date: 10/19/82
Paper: Home News
By-Line: AP
Name Quoted: Orechio
Category: Senate

Quote: "If we had more prayer, we would eliminate many of the problems that still exist."

Date: 10/19/82
Paper: Star-Ledger
By-Line: Piserchia, Mike
Name Quoted: Orechio
Category: Senate

Quote: "If we did restore prayer in the schools, we would have a lot less problems in our classrooms. This bill will not harm any school-age child. Rather, it will restore his faith in his creator."

Date: 12/3/82
Paper: Bergen Record
By-Line: Shure, Jon
Name Quoted: Orechio
Category: Senate

Quote: He was one of those who went public with the bill's unspoken intent when he described it as a way of "bringing prayer back into the schools through the front door." Yesterday he said, "I said that basically to attract votes. Other people saw it another way. I just called it as it is, and I support it."

Date: 10/25/82
Paper: Star-Ledger
By-Line: Seidenstein, Robt.
Name Quoted: Orechio
Category: Senate
Quote: He said the bill's adoption would mean "bringing prayer back into the schools through the front door." During the Senate debate, he said "if we did restore prayer in the schools we would have a lot less problems in our classrooms. This bill will not harm any school-age child. Rather, it will restore his faith in his Creator."

Date: 12/2/82
Paper: Star-Ledger
By-Line: Seidenstein & Susi
Name Quoted: Orechio
Category: Senate
Quote: He said it would mean "bringing prayer back into the schools through the front door."

Date: 10/19/82
Paper: Phila Inquirer
By-Line: Tollerson, Ernest
Name Quoted: Orechio
Category: Senate
Quote: In support of the bill, he said that it would mean "bringing prayer back into the schools through the front door." "Most of our youngsters are well-meaning, are disciplined, don't cause problems for society in general, but I think if we had more prayer, more religion, a lot of the problems that are brought to us by our youngsters would be eliminated and avoided."

Date: 10/19/82
Paper: Star-Ledger
By-Line: Piserchia, Mike
Name Quoted: Orechio
Category: Senate
Quote: "If we did restore prayer in the schools, we would have a lot less problems in our classrooms. This bill will not harm any school-age child. Rather, it will restore his faith in his creator."

Date: 12/23/82
Paper: Trenton Times
By-Line: Pollack, Jill
Name Quoted: Russo
Category: Senate
Quote: ". . . personally, I have serious doubts about whether it is constitutional myself."

Date: 12/3/82
Paper: Phila Inquirer
By-Line: Weiner, Tim
Name Quoted: Zane
Category: Senate
Quote: "I think (Zangari's bill) is a good idea. We begin our Senate sessions with prayers offered by clergymen of different denominations each and every time. So does each municipality throughout the state. I don't think it's wrong to have that kind of example for children in school."

EXHIBIT C

Date: 1/20/83
Paper: Home News
By-Line:
Name Quoted: Editorial
Category: Public
Quote: "That poorly disguised—and unconstitutional —way of reintroducing prayer in public schools was created over the most strenuous and well-advised objections of many responsible people including Gov. Thomas Kean, Attorney General Irwin I. Kimmelman and education Commissioner Saul Cooperman."

Date: 1/13/83
Paper: Central Post
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "... throughout history many have been harmed by the good intentions of religious people who have sought to impose their notions on others ... demanding (a moment of silence) in a public institution in the name of religion is surely a step along a path fraught with peril."

Date: 12/21/82
Paper: Trentonian
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "Governor Kean correctly observed that the use of the word 'meditation' is merely a subterfuge to circumvent repeated court mandates against prayer in public schools. Any suggestion to the contrary is a hypocritical lie ... the introduction of such a bill put pressure on other legislators to support it, or risk appearing to constituents as being against prayer."

Date: 1/14/83
Paper: Trentonian
By-Line: Herrick, Frank
Name Quoted: Editorial
Category: Public

Quote: "... It is a continuance of an effort to insure that government, and any government supported program, has absolutely no say or control over what or how religion is observed."

Date: 1/11/83
Paper: Courier-News
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "It was irresponsible for the legislature, having before it a history of recent court rulings showing its plan to be unacceptable and having been refused enforcement power by the governor of the state, to persist in completing its exercise ... now it will be up to Judge Debevoise to correct the legislature's mistake and throw out the requirement of a minute of silence. Those who

want to start their day with a prayer will still be free to do so, but the heavy hand of the legislature will be lifted from the schools."

Date:
Paper: Daily Princetonian
By-Line: Robinson, Bert
Name Quoted: Editorial
Category: Public

Quote: "The word 'prayer' would have been the bill's kiss of death. The phrase 'quiet and private contemplation or introspection' is much sneakier. The supporters of the minute of silence may be crazy, but they aren't stupid."

Date: 1/24/83
Paper: Star-Ledger
By-Line: Fulton, Edithe
Name Quoted: Fulton
Category: Public

Quote: "Prayer soothes, inspires, gives hope, brings peace of mind, yet the mere mention of it can cause legislation and litigation. The latest example is the new state law requiring the public schools to offer students a moment of silence at the start of each day." (Edithe A. Fulton, president, NJ Education Assn)

Date: 1/21/83
Paper: Newsday
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "There is an understandable suspicion among opponents of the minute of silence that it's a device designed to circumvent legal prohibitions against prayer in the schools. After all, if no religious purpose is intended, what serious secular purpose is intended, what serious secular benefit can be derived from 60 seconds of silence mandated by law and conducted under specified circumstances at specified times?"

Date: 1/9/83
Paper: Bergen Record
By-Line: Fisher, Harvey
Name Quoted: Boyle
Category: Public
Quote: He contends the schools should be kept free of anything smacking of religion. "The schools should not be in the middle of something like this." (Charles Boyle, Edison Superintendent of Schools)

Date: 1/9/83
Paper: Bergen Record
By-Line: Fisher, Harvey
Name Quoted: Yelenscics
Category: Public
Quote: "The moment of silence pays respect to God. In a way it replaces a prayer." (Anthony Yelenscics, Edison Mayor)

Date: /1/9/83
Paper: Bergen Record
By-Line: Fisher, Harvey
Name Quoted: Bright
Category: Public
Quote: "It's a step toward getting prayer back into the public schools, and I don't think religion has any place in the public schools." (Molly Bright, John F. Stevens High School Librarian)

Date: 1/8/83
Paper: Courier-News
By-Line: Beyrau, Caroline
Name Quoted: Anonymous
Category: Public
Quote: "If they want to pray, they can do it any time during the day. They don't need a special moment." (Hillsborough High School Senior)

Date: 1/8/83
Paper: Courier-News
By-Line: Beyrau, Caroline
Name Quoted: German
Category: Public

Quote: She said she disliked the law because of its religious implications. "I think it stinks, I'm not going to a catholic school, I'm going to a public school." (Sheryl German, Piscataway 9th Grader)

Date: 1/11/83
Paper: Star-Ledger
By-Line:
Name Quoted: Shepard
Category: Public
Quote: "We're talking about morality." (John Shepard, Old Bridge Board of Education President)

Date: 1/11/83
Paper: Bergen Record
By-Line: Light & O'Brien
Name Quoted: Insley
Category: Public
Quote: "It's a backdoor way of getting prayer back into the school." (Larry Insley, Teacher, Bogota High School)

Date: 1/11/83
Paper: Bergen Record
By-Line: Light & O'Brien
Name Quoted: Kaufmann
Category: Public
Quote: " . . . they're mixing church and state." Judy Kaufmann, 18 yrs. old, senior, Bogota High School)

Date: 1/11/83
Paper: Bergen Record
By-Line: Light & O'Brien
Name Quoted: Leara
Category: Public
Quote: "I hear it's because they want to get religion back in the schools. People aren't getting anything out of it. If they want us to pray, people can do it on their own time." (Lisa Leara, 18 yrs. old, Senior, Bogota High School)

Date: 1/11/83
Paper: Bergen Record
By-Line: Light & O'Brien
Name Quoted: Dreyer
Category: Public
Quote: "I think it's stupid. It doesn't belong in schools. They don't want religion and the state to intermingle, but it does." (Chris Dreyer, 17 yrs. old, Senior, Bogota High School)

Date: 1/11/83
Paper: Home News
By-Line: Edelman, Renee
Name Quoted: Wilfond
Category: Public
Quote: About 35 students of John P. Stevens High School in Edison protested in a statement read to the school board by Spokesman David Wilfond: the "legislative intent of the law is to re-establish prayer in the public schools . . . contemplation, as defined by the unabridged Webster's International Dictionary, is prayer."

Date: 1/9/83
Paper: Phila Inquirer
By-Line: Maykuth, Andrew
Name Quoted: Keyek
Category: Public
Quote: Several Audubon parents telephones School Superintendent Eugene Keyek, angry that their children would be compelle to engage in what they considered a religious exercise.

Date: 1/7/83
Paper: N Y Times
By-Line: Norman, Michael
Name Quoted: Connolly
Category: Public
Quote: "For me I have to be alone to pray. I can't concentrate on God when there's all these people around. There's no law that says everyone has to be quiet." (Sharon Connolly, 17 yrs. old, James Caldwell High School, West Caldwell)

Date: 1/7/83
Paper: N Y Times
By-Line: Norman, Michael
Name Quoted: Woudenberg
Category: Public
Quote: "I see this as an ominous intrusion by the religionists." (Richard Woudenberg, Teacher, James Caldwell High School, West Caldwell)

Date: 12/20/82
Paper:
By-Line: Gil, Gideon
Name Quoted: Oravsky
Category: Public
Quote: "They shouldn't make you pray in public if you don't want to." (Cheryl Oravsky, 16 yrs. old, Junior at Nottingham High School, Hamilton)

Date: 12/21/82
Paper: Courier News
By-Line:
Name Quoted: Editorial
Category: Public
Quote: " . . . the statements of some of the bill's backers make it clear that a desire to return prayer to the schools is an important motivation behind the move. It's time for people to accept that the separation of religion and state has been recognized by the courts as an integral part of the Constitution, and for efforts to sneak around that stricture to cease."

Date: 1/12/83
Paper: Trenton Times
By-Line: Blaze, Harry
Name Quoted: Editorial
Category: Public
Quote: "It is not surprising that the opponents of the 'silence' law say it is an unconstitutional intrusion of religion in the schools because it clearly suggests that the moment of silence is to replace the prayers that once were said in schoolrooms all across the land."

Date: 3/7/83
Paper: Star-Ledger
By-Line: Letter to Editor
Name Quoted: Cueva
Category: Public
Quote: "The moment of silence is just a stepping stone for prayer in our schools. . . . I also feel that religion and prayer are things that should take place either in the home or church and not in a place to learn." (Andrew Cueva, 7th Grade, Belleville Middle School, Belleville)

Date: 12/21/82
Paper: N Y Times
By-Line:
Name Quoted: Editorial
Category: Public
Quote: "The Governor's lawyer is surely right about the law's purpose, as betrayed by legislators in floor debate. It is a disguised attempt to 'bring prayer back through the front door,' as one Senator put it . . . . why not get out of the business of legislating public morality and repeal this deceptive little law? If it were found constitutional, that would be only because the legislature has trivialized religion by disguising it."

Date: 12/21/82
Paper: Bergen Record
By-Line: Letter to Editor
Name Quoted: Chuman
Category: Public
Quote: "The bill is an attempt to circumvent the Constitution and bring back prayer to the schools by calling it something else. The bill's sponsors make no effort to disguise that fact. One sponsor, Assemblyman James Zangari, told me explicitly that he saw his bill as a first step toward restoring prayer to the public schools and that he hoped that bible-reading would follow. He said, 'prayer never did me any harm.'" (Joseph Chuman, Ethical Culture Society of Bergen County, Teaneck)

Date: 12/27/82
Paper: Star-Ledger
By-Line: Letter to Editor
Name Quoted: McCauley
Category: Public
Quote: "The founding fathers would have vomited at the thought of introducing a 'moment of silence' to the public school curriculum. I trust that the New Jersey Supreme Court will also." (Donald J. McCauley, Clifton)

Date: 12/27/82
Paper: Star-Ledger
By-Line: Letter to editor
Name Quoted: Stein
Category: Public
Quote: " . . . we should wonder why our legislature is concerned with bogus issues like prayer in schools when we have more important issues . . . to worry about. Meditation is more appropriate in the home or house of religious worship—not in my school. My parents pay taxes for me to learn in school—they do not pay for me to pray!" (Sheryl Stein, Toms River)

Date: 12/21/82
Paper: Star-Ledger
By-Line:
Name Quoted: Editorial
Category: Public
Quote: "The new statute has been widely interpreted as a subterfuge, an evasive statutory maneuver to get around the constitutional strieture. Whether verbal or silent, a prescribed daily ritual has obvious religious overtones, a view shared by Gov. Thomas Kean and Federal Judge Harold Ackerman. . . . Sen. Orechio was quoted as saying that the law would bring 'prayer back into the schools through the front door.' The senate leader's candor would appear to remove any residual doubts over the intent of the law, despite other statements to the contrary."

Date: 10/21/82
Paper: Courier-Post
By-Line:
Name Quoted: Editorial
Category: Public

Quote: " . . . the legislators labored mightily to recapture the good old days that never were by rewriting the constitution: school prayer with a wink . . . . it is—as openly conceded by Senate President Carmen Orechio, D-Essex, a back-door school-prayer bill . . . . its intent is clearly to circumvent the constitutional prohibition against state establishment of religion."

Date: 10/22/82
Paper: Trentonian
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "They've been at it again this week, arguing about a mandatory school meditation (spell p-r-a-y-e-r) period that has been struck down repeatedly by state and federal courts. . . . The few lawmakers courageous enough to resist such pushes recognize that the maneuvers are merely a devious attempt to circumvent constitutional bans on school prayer."

Date: 12/6/82
Paper: Trenton Times
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "Gov. Thomas H. Kean was precisely correct in his veto of the 'minute of silence' bill. He cited the legislative history of the bill, which clearly showed that, although the legislature was talking silence, it meant prayer . . . . as if to prove Kean was right, Sen. Brian Kennedy, R-Monmouth, who objected to the veto, said, 'let atheists stand there and think about watching television.' Kennedy clearly implied that others would be praying."

Date: 10/28/82
Paper: Bergen Record
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "The state assembly dares not call it prayer, but last week, by a margin of 62-9, it voted to allow a one-minute 'meditation' in public schools . . . . four years ago, the legislature passed a bill calling for a minute of 'silence' in New Jersey schools. Fortunately, former Gov. Brendan Byrne was not fooled by the euphemism and vetoed it on constitutional grounds. Now the lawmakers, led once more by Assemblyman James Zangari of Irvington, have another name for it—meditation. But Mr. Zangari himself admits that he doesn't see anything wrong (continued)

Date: 10/28/82
Paper: Bergen Record
By-Line:
Name Quoted: Editorial
Category: Public
Quote: (continued) with a little prayer in the schools. 'No one should ever be coerced to take part in a religious exercise, but neither should it be forbidden.' "

Date: 10/20/82
Paper: Trenton Times
By-Line:
Name Quoted: Editorial
Category: Public
Quote: " 'Look at what has happened since school prayer was banished,' exclaimed Sen. Francis McManimon, D-Hamilton. in an exclamation that managed to combine bad history with a non sequitur and give away the whole game."

Date: 10/20/82
Paper: Trenton Times
By-Line:
Name Quoted: Editorial
Category: Public
Quote: "Requiring schooldays to start with one minute of silence is the legislature's way of passing a law forcing school children to start the day with a prayer. School prayer is patently unconstitutional, of course, so

supporters of 60 seconds of silence passed the next best thing, a school prayer bill that doesn't mention praying. The legislative history of the silence bill—something the courts are sure to look at—is that it began with the intent of forcing prayers into the classroom, and it wound up with the intent of smuggling them in."

Date: 12/6/82
Paper: Bergen Record
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "The measure . . . didn't say so outright, but its intent was clearly to brink back prayer in the schools. Some of its supporters said as much. . . . Calling prayer by another name—meditation or a 'moment of silence,' as the legislature suggested four years ago—does not change the nature, or the unconstitutionality, or the exercise."

Date: 12:16:82
Paper: Atlantic City Press
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "The 'minute of silence' bill is one more attempt to circumvent a Supreme Sourt ruling that established prayer in public school as an unconstitutional mix of church and state."

Date: 11/1/82
Paper: Star-Ledger
By-Line:
Name Quoted: Editorial
Category: Public

Quote: "The conclusion remains inescapable: Prayer in the school is not permitted and calling prayer meditation or reflection or any one of a thousand euphemisms does not alter the situation."

Date: 10/29/82
Paper: Star-Ledger
By-Line: Braun, Robt J
Name Quoted: Editorial
Category: Public
Quote: "It clearly is an effort to reintroduce prayer —and, for good or ill, that issue has been resolved by the U.S. Supreme Court. The road chosen by the legislature creates the unseemly spectacle of theoretically responsible adults trying to play a semantic trick on constitutional law." "Youngsters will ask questions about this moment of silence. . . . They will learn the whole point is to reintroduce prayer by pretending they are not being asked to pray."

Date: 12/19/82
Paper: Star-Ledger
By-Line: Maske, Monica
Name Quoted: Peterson
Category: Public
Quote: The legislature is "trying to get religion into the public schools." (Dave Peterson—Senior, Lawrence High School.)

Date: 12/19/82
Paper: Star-Ledger
By-Line: Maske, Monica
Name Quoted: Nissen
Category: Public
Quote: It sounds like "another way to say 'let's have a prayer.'" (Jennifer Nissen—Lawrence High School.)

Date: 12/19/82
Paper: Star-Ledger
By-Line: Maske, Monica
Name Quoted: Cegan
Category: Public
Quote: "All the kids were talking about it. My friend, Debbie, said we were going to have a moment of prayer. Everyone was saying it was prayer, and every-

one was saying it was dumb. My protestant friend said she doesn't go to church so why should she pray in public school." (Cynthia Cogan—Maplewood Middle School.)

Date: 12/19/82
Paper: Bergen Record
By-Line: Auster & Fisher
Name Quoted: Cipolaro
Category: Public

Quote: He called the bill a "misguided" attempt to revive school prayer. (Enrico Cipolaro—Pompton Lakes School Superintendent.)

Date: 12/19/82
Paper: Bergen Record
By-Line: Auster & Fisher
Name Quoted: Bial
Category: Public

Quote: "I think the moment of silence is directly related to prayer, and church should be separate from state." (Debbie Bial—Senior, Teaneck High School.)

Date:
Paper: Home News
By-Line: Diegmmueller, Karen
Name Quoted: Juskow
Category: Public

Quote: She believes the measure violates the separation of church and state. "Prayer should definitely not be in the school." (Beth Juskow—John P. Stevens High School, Edison.)

Date:
Paper: Home News
By-Line: Diegmueller, Karen
Name Quoted: Levine
Category: Public

Quote: She believes the minute of silence is but the first step to prayer. (Monica Levine, 17 yrs. old, John P. Stevens High School, Edison.)

Date:
Paper: Home News
By-Line: Diegmueller, Karen
Name Quoted: Cash, Wm
Category: Public
Quote: "I personally think that it's bringing back prayer to school." (William Cash—Senior, John P. Stevens High School, Edison.)

Date: 1/2/83
Paper: Phila Inquirer
By-Line: Tollerson, Ernest
Name Quoted: Redlich
Category: Public
Quote: "I think the history of the whole New Jersey legislature picture is that bring state-sanctioned prayer into the public schools." (Norman Redlich—Dean, New York Univ Law School—testified against Helms legislation in Senate Judiciary Committee.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, et al.,	)	
	)	Civil No.
Plaintiff,	)	83-89
	)	
v.	)	TRANSCRIPT OF
	)	PROCEEDINGS
DR. SAUL COOPERMAN, et al.,	)	
	)	
Defendants.	)	

Newark, New Jersey
April 20, 1983

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE, U.S.D.J.

Appearances:

PELLETTIERI, RABSTEIN & ALTMAN, ESQS.,
BY: RICHARD ALTMAN, ESQ.,

and

STEPHEN LATIMER, ESQ.,

For the Plaintiff
HANNOCH, WEISMAN, STERN, BESSER,
BERKOWITZ & KINNEY, ESQS.,
BY: WILLIAM W. ROBERTSON, ESQ.,

and

RALPH J. MARRA, JR., ESQ.,

and

ROBERT P. ZOLLER, ESQ.,

MARINARI & FARKAS, ESQS.,

BY: LAWRENCE T. MARINARI, ESQ.,
For the General Assembly

(p. 2) THE COURT: I've read your papers. I have a pretty good idea of what your basic contentions are.

I give you each about ten or 12 minutes, and I'll put an opinion on the record. You can respond to whatever you don't think was responded to in your brief, or bring out anything of major significance. I think it's pretty straightforward.

MR. ALTMAN: Richard Altman, Pellettiere, Rabstein and Altman, counsel for plaintiffs.

Your Honor, I agree that the matter is fairly straightforward, although I think the defense has artfully made the proposition here a little bit more confusing than might otherwise be. I would like to put it in its proper factual context for about a moment or two.

We are seeking to introduce by way of newspaper articles evidence of the legislators' purpose in enacting this Moment of Silence statute to meet—persuade the Court that the statute doesn't meet the first prong of the test in determining whether or not this statute violates the establishment clause.

We have at this date approximately 100 articles by various authors around—that have been published in papers throughout the state of New Jersey. My understanding is that those articles continue to come in as we move south. We have begun in North Jersey and Central Jersey.

(p. 3) The interesting thing about the articles is that they are uniform and consistent throughout the state in that whether it be quotations of legislators, particular legislators that were very active in the passage of this bill, many of whom were co-sponsors of the bill, or lead-

ing in the Senate and Assembly, or whether it be comments by editorial writers, the opinion of editorial writers, or it be third parties writing letters to the editors.

One thing is consistently clear throughout that the public debate; whether people are for this statute or against the statute, whether they are for prayer in the public school or against it, they are uniform in that that is the issue being debated.

THE COURT: Yes. Don't you think it makes a difference whether these articles are before or after enactment of the legislation with respect to the purpose for which they would be admissible?

MR. ALTMAN: No, I don't. Of course, we have to break that down again as to whether or not arguably we are offering it for purpose or for effect.

THE COURT: Well, which are you offering it for?

MR. ALTMAN: I'm offering it for both, and that's one reason I would say I would make no distinction as to whether the statements were contemporaneous statements.

For the most part, I believe the statements by (p. 4) the legislators are contemporaneous statements with the development and passage of the bill.

THE COURT: That would go to purpose.

MR. ALTMAN: And that would go to purpose.

THE COURT: What they say afterwards wouldn't necessarily go to purpose.

MR. ALTMAN: No, I would agree with that. We wouldn't be offering them if they were self-serving or disavowals of their purpose or the purpose that we easily

glean from their prior remarks, and that is to put prayer back in the public school.

That's precisely why we argue under the standard of reliability and trustworthiness, and the exception to the federal hearsay rule under Section 24 of Rule 803, we suggest the Court ought to allow the admission of this evidence by way of newspaper articles without the necessity of bringing in 50 to a hundred different authors, many of whom we have contacted, and indicated to us that they would move to quash, even if there was no legitimate basis for moving to quash.

THE COURT: Well, they would get very short shrift.

MR. ALTMAN: I believe that as well.

THE COURT: There is no confidential source or privilege here that I can see. They would be arguing burdensomeness, I suppose. That's for another day.

(p. 5) MR. ALTMAN: That's right.

THE COURT: But just for those who are present, which I fail to see the basis for, if it was a legitimate need for their presence, at the risk of raising the wrath of the press.

MR. ALTMAN: We were rather confident your Honor would perceive that issue in that manner, but our problem still remains that if it were required to bring in these newspaper persons from all around the state, there is a substantial expense incurred by the ACLU, which it can ill afford.

Two, we are going to take considerable court time and time of counsel, which I don't think is necessary in the

context of this case. Because I think in the context, the statements we are offering have circumstantial guarantees of trustworthiness and reliability.

I think it is unreasonable to require us to endeavor to produce the actual newspapermen when we have such circumstantial guarantees of trustworthiness.

I say that because all of the stories are uniform. No one quotes, for example, Assemblyman or Senator Kennedy, or Adubato or Orechio about their purpose for the introduction of the legislature, and says different things.

We'll have different reporters in five different papers saying the same thing he said.

(p. 6) If we had a discrepancy, I would say there is a suggestion, a question about the reliability of the statement, whether it was said or not.

But we don't have that. It is uniform throughout these articles as to what the men are quoted as saying.

Secondly, which I suggest makes it very unreasonable for us to be burdened with bringing in these people, is there is no denial that they made the statements.

The legislators have intervened with the permission of the Court. They were not defendants in this action. They have voluntarily chosen to come in and defend.

They sought the protection of the Court, and the Court entered a protective order authorizing them or barring the plaintiff from requiring the legislators to either admit or to deny the truth as to whether or not they made the statements.

THE COURT: I insulated them from all discovery.

MR. ALTMAN: That is correct. And I would assume that in line with the arguments that were made, although your Honor never made a determination per se based upon their claim of privilege, that the Court's opinion would extend to precluding us from suboenaing these individuals into court for them to either admit or deny.

THE COURT: I don't understand what the computer printouts are.

(p. 7) MR. ALTMAN: The computer printout is just to show, in line with the rule itself, 803(24), to show exactly what we intended to introduce.

This gives the statements themselves, the dates that they were made, the newspaper in which they were found, the individual being quoted, to give the Court an idea as to the type of—not just an idea, but precisely the quotations that would be offered in evidence and to give notice to counsel for the intervenor-defendants as to what we intend to offer.

THE COURT: Was this derived from the articles in the yellow folders?

MR. ALTMAN: Yes. It is my understanding that the Court has been supplied with copies of all the articles that we intended to introduce.

THE COURT: And the defendants have been supplied with that.

MR. ALTMAN: That's correct.

THE COURT: This merely is summary. The printouts are summaries from these basic articles for convenience.

MR. ALTMAN: Yes. I think it pulls out the key language, the key quotes that we think are evidential by their purpose or effect.

THE COURT: What's the difference between A, B (p. 8) and C? You have three different collections.

MR. ALTMAN: A is the legislators. B are the editorial writers or commentators discussing the subject. C—B meaning the editorial writers, commentators, part of the press, working for the papers.

THE COURT: Yes.

MR. ALTMAN: C goes to third-party statements, letters to the editors by members of the public, whether they be students or teachers, commenting on their perceptions of this particular legislation.

THE COURT: Well, you would agree, would you not, that the statement in the newspapers of what the legislators said is hearsay?

MR. ALTMAN: Well, it's hearsay. I suggest it comes within exceptions.

THE COURT: So there is no question but that it would be hearsay, if you're admitting it for the purpose of showing what the legislators said.

MR. ALTMAN: In the form of the newspaper articles. If it was in the form of a newspaperman and the legislators' statements are admissions under the federal rules, we don't technically classify them any longer as hearsay.

THE COURT: Well, it depends on whether you consider legislative parties technically parties to the (p. 9) action. I don't know whether they are or not.

Well, all right.

MR. ALTMAN: Either way, whether it's hearsay, I think that clearly that type of statement would be in line with the traditional admission under the hearsay exception.

THE COURT: All right.

MR. ALTMAN: But I think the key thing here is whether we pinpoint a particular exception to the rule, such as we used to refer to admisisons or what have you, when we look to 803(24), and we bear in mind that on the question of hearsay, the courts look to basically the test is trustworthiness and reliability, and we know that the public debate in the state, ever since they attempted to pass this and put it through, and through the process of the veto and the override, has been uniformly statements by these legislators that they intended this for—to be a religious exercise, to be a way of circumventing the federal Constitution.

If there was a serious debate as to the truth that was there statements, that they made statements, not that that was the purpose, but those were the statements they made, I would recognize that we woul dhave to proceed by way of other than hearsay. I wouldn't ask the Court to excuse us from the burden of producing the newspapermen, for example.

But they have neither denied the truth of the (p. 10) statements—and we have been handicapped in that regard because we are not permitted to get a—a demand for admission. And I think it would require us to put

blinders on and the Court to put blinders on for us to believe that this isn't precisely what they said.

There has been no genuine denial. There has been no circumstantial denial that these statements were made.

For that reason I say that we should look to the Section 24 of 803, the Court shall permit the introduction.

I will bear in mind if we had an affidavit from a legislator denying he made a statement, then I would readily agree we better produce somebody under oath and subject to cross-examination to say that he made that statement.

THE COURT: All right. Thank you very much.

Mr. Robertson.

MR. ROBERTSON: Judge, as an anticipatory point, I just have to note that I was under, as my letter indicated, a misimpression. I did not understand that there would be a whole host of editorial and third-party comments that are being offered.

I talked to Miss McHugh on the 12th. She indicated, as I indicated in my letter, that the material to be offered was essentially the material annexed to their submission that was submitted to you in January.

THE COURT: That's the more difficult material, (p. 11) because that's the hearsay.

MR. ROBERTSON: I agree, Judge. There are a whole host of problems, not only in the hearsay area, but in the area of 701 and 702, opinion evidence and our inability to examine the basis of the opinion being offered by the lay witness, whether that be an editor who has written an editorial, whether that be a letter to the editor, and I would

also point out that there is in no circumstances—and again, I'm not ready to explore it completely—absolutely no showing of any necessity for these people—these people are not —if we characterize the legislators as being the type of people that Mr. Altman can't talk to—can't bring them in.

THE COURT: No. You created a bar. You've raised the privilege.

MR. ROBERTSON: Absolutely.

THE COURT: I'm not saying a privilege, but at least I'm saying for the reasons you have suggested, they are exempted from discovery. So you've closed doors, the normal avenues of access to this information.

MR. ROBERTSON: Let me address that directly.

THE COURT: Yes.

MR. ROBERTSON: I know of no rule of law, and I have found no case that says a person who raises a privilege subjects himself to wholly inadmissible hearsay evidence.

THE COURT: You're begging the question. The (p. 12) question is whether it's inadmsisible.

Are you claiming these statements were not made?

MR. ROBERTSON: Judge, I am not in a position to tell you that these statements were not made. I am in the position—

THE COURT: Then you're not talking to your clients. They can either tell you these are false or these are true.

MR. ROBERTSON: I am in the position to tell you that of the legislators we have contacted, and of the staff

members we have contacted, these statements are taken wholly out of context.

They are fragment utterances of legislators during the heat of public debate, not over the course of one isolated session, but during the course of a whole host of sessions.

The comments themselves may be, and I detect that in some of the articles, misconstrued and directed towards other legislation.

Example, at the time that Mr. Zangari proposed the minute of silence or the Moment of Silence legislation regionally, it was a three-minute bill.

At the same time, in the same session, he had a bill that called for an opportunity to read Bibles and say prayers on public school grounds.

(p. 13) In one of the articles it's abundantly clear that the reporter has confused remarks going to the second bill as going to the first bill.

Now, I have not sorted those all out.

THE COURT: He may want to waive his rights and subject himself to testimony and come in and talk himself.

MR. ROBERTSON: Absolutely not.

THE COURT: All right, then he has to live with it. He can't have it both ways.

MR. ROBERTSON: He can have it both ways, and it is not both ways.

THE COURT: He's not going to get it.

MR. ROBERTSON: It is totally consistent with the privilege we have raised.

THE COURT: It is not a privilege. Let's stop talking about a privilege.

MR. ROBERTSON: Then I wanted one other point made.

THE COURT: Yes.

MR. ROBERTSON: Because I think this is a critical time in this proceeding.

If your Honor is holding that there is no privilege, then I wish your Honor would hold that clearly and unequivocally so that we may take an interlocutory appeal.

THE COURT: No. You've got your order. They are (p. 14) protected under Federal Rules of Civil Procedure. I have said that they have claimed that it is a burdensome thing for a legislator to have to come out and answer for his every act and I agree. They shouldn't have to do that.

But that's not an absolute privilege.

MR. ROBERTSON: Let me not get us off the prong.

THE COURT: Yes.

MR. ROBERTSON: I maintained clearly, as I've written in my submission to your Honor, that admitting this material, even if it were reliable, would violate the privilege.

THE COURT: That's just absurd. If you look at the New Jersey cases, which refer to what legislators say all the time, New Jersey has found no privilege. And if they have found no privilege to refer to what they set, why should the federal courts invent a privilege?

MR. ROBERTSON: I fully agree with you. New Jersey has not found the privilege because the issue has never been presented to those judges.

THE COURT: Oh, that's ridiculous. The federal courts have quoted what legislators have said time and time again.

You're taking things totally out of context. This is to hold a legislator, a federal congressional legislator criminally liable for things he has said.

(p. 15) This is no attempt to do that here.

MR. ROBERTSON: Judge, I respectfully disagree with you. I have not taken them out of context. No court that you can point to, nor the plaintiffs have cited you to, has addressed the issue we have raised.

THE COURT: That's because it is so outside the realm of reason.

MR. ROBERTSON: As you have observed quote, unquote the last time, it is unique and has not been raised.

THE COURT: All right, go ahead.

MR. ROBERTSON: Two other prongs to our argument. Let's go to the most rudimentary prong, and that is the prong of hearsay.

Mr. Altman has candidly admitted now that these utterances are being offered for the truth of the matters asserted therein.

THE COURT: Only partly. And that's only to the extent that they are trying to establish what the legislators said.

MR. ROBERTSON: I agree.

THE COURT: That is hearsay.

MR. ROBERTSON: That is hearsay.

THE COURT: But it is not hearsay if you take this whole mass of material as evidence of what the public was being exposed to. True or not, whether the legislators said (p. 16) it or not, this is what they are being exposed to for the effect of the legislation. That's not hearsay.

MR. ROBERTSON: I'm not going to take an irresponsible position.

THE COURT: I'm sure you never would.

MR. ROBERTSON: As I had pointed out in my brief, Miss McHugh has asked for a stipulation as to authenticity.

THE COURT: No problem, because they are self-authenticating.

MR. ROBERTSON: There is a self-authenticating rule.

THE COURT: We don't need that.

MR. ROBERTSON: But what we have is a problem of authentic what.

THE COURT: Of what the newspapers said and what the public read.

MR. ROBERTSON: Oh. The public has read reports of statements.

THE COURT: Yes.

MR. ROBERTSON: Now, if there is a test under the establishment clause that says what the public perceives shall control, whether that's accurate or not, then I will yield.

THE COURT: It doesn't control, but it is evidential.

MR. ROBERTSON: No. The prong, I said, whether (p. 17) it's accurate or not, I will yield. I will concede. There is no such test.

THE COURT: No test of what?

MR. ROBERTSON: There is no such test that that type of public perception is evidential or relevant to the very difficult inquiry and determination that your Honor must make.

THE COURT: It's very clearly relevant. There are three things that I have to look to, the purpose of the legislation, the effect of this legislation, and whether it involves an entanglement.

MR. ROBERTSON: That's correct.

THE COURT: What the public perceives as the purpose of the legislation and the effect is very material to what the effect will be.

MR. ROBERTSON: Judge, that is an inference, and I believe that is a leap of faith, that no case that your Honor is familiar with—and I know your Honor does his homework—has held as such.

THE COURT: I disagree.

MR. ROBERTSON: In due respect, what your Honor is confusing is the likelihood for political dissention along

religiously fragmented lines. That, sir, is not a prong of the effect test.

THE COURT: I'm just simply asking, what does the (p. 18) public perceive this to be?

MR. ROBERTSON: The test is not what the public perceives it to be. The test is whether the act has the effect of advancing or inhibiting religion, not what people subjectively believe it will do, but what, in fact, it does.

THE COURT: Yes, but what they believe it will do will have a very material effect upon what it does do.

MR. ROBERTSON: And I say again, that is a leap of faith.

THE COURT: I disagree. I say it is a rational conclusion.

MR. ROBERTSON: Let's get back to what we are talking about on the application here.

Mr. Altman has been candid. This is being offered for the purpose test, the purpose.

THE COURT: That's one of the things.

MR. ROBERTSON: Judge, I'm going to yield. I agree it is also being offered as the effect test that's really more your Honor's concept than it is the plaintiffs, but the plaintiffs have adopted it. Let me just focus on purpose.

THE COURT: All right.

MR. ROBERTSON: The purpose test under the establishment clause requires that the statute have a secular legislative purpose. That's important to focus upon.

(p. 19) THE COURT: Primarily.

MR. ROBERTSON: Judge, if you look at Nyquist, you look at Larkin, it goes something like this; primarily, clearly, just plain legislative secular purpose. I recommend to your Honor that I cannot resolve the different adjectives used.

There does not seem to be any explanation in Justice Burger's different formulation of the test. He has formulated it three different ways.

Clearly, primarily, or just plain.

THE COURT: All right, that gives us the general idea of what he's driving at.

MR. ROBERTSON: I agree. It does give us the general idea of what he's looking for.

That does not require any evidence of legislator motivation, none at all.

THE COURT: I'm not talking about motivation. It's the purpose of the statute.

MR. ROBERTSON: That does not require any examination of the utterances of political entities during the course of debate.

THE COURT: Congress debate, Congress records have been referred to frequently by the Supreme Court and other respected institutions of the judiciary for determining what the purpose of legislation is.

(p. 20) MR. ROBERTSON: Absolutely referred to, very hesitantly, and in very limited cases, as an aid to interpreting inescapable, ambiguous language.

THE COURT: That's different. This is not interpreting ambiguous language. The language is very clear.

MR. ROBERTSON: If your Honor is saying the Supreme Court has referred to selected floor debate comments of less than a handful of legislators to vary, alter or contradict the terms of a statute, I say that is not true.

THE COURT: There is no contradiction of a statute here. It is going to be applied or it isn't going to be applied exactly as it is written.

I don't see any ambiguity in the language of the statute whatsoever.

MR. ROBERTSON: Then I submit to your Honor there is no reason for you to go behind the words of the statute. The plaintiffs—

THE COURT: I would submit you are in error, because that is not the problem in this case. The problem is what is the purpose of this statute.

MR. ROBERTSON: Judge, the purpose of this statute can be drawn from the language itself.

THE COURT: No.

MR. ROBERTSON: Now your Honor is being, I think, misled, and it is a very attractive opportunity. By reference (p. 21) to the civil rights cases, the voting rights cases, where purpose has always been a legitimate inquiry.

THE COURT: This is a civil rights case.

MR. ROBERTSON: Civil rights, voting rights, racial discrimination cases.

I submit to your Honor that conceptually we are talking about two different types of inquiries. Let's just focus on that for a second.

In the area of racial discrimination, an inequity, in effect, is insufficient as a matter of law to show that the act is violative of the equal protection clause.

THE COURT: I don't understand what you're saying.

MR. ROBERTSON: Judge, if we have a statute that has the effect of acting unequally upon groups, one group being a minority group, that the courts have said is not itself sufficient to show that statute violates the equal protection clause.

The plaintiffs must additionally show—

THE COURT: My silence must not be accepted as accepting your views.

MR. ROBERTSON: I agree. I appreciate the opportunity to develop the concept that I'm trying to have the Court focus on.

The plaintiffs in those cases are put under an (p. 22) additional enormous burden of having to show that that inequal or unequal effect is motivated by impermissible racial considerations.

In those cases the Court has entertained evidence—I think it is unfair that I should be cut off by the fire bell.

THE COURT: Your 15 minutes is up.

MR. ROBERTSON: Was it a part and parcel of a racial motivation? That's clear. And I submit to your Honor it is clear if you examine those cases critically, that when they place the plaintiffs under a wholly difficult burden, they have stretched the rules that they would normally apply and permit that kind of inquiry.

I'm not going to fight that. I'm going to bring us back to this case, because I'm going to say right now that's not the plaintiffs' burden in this case.

The plaintiffs' burden in this case is to show that that statute does not have a legitimate secular legislative purpose. That can be done wholly without legislator comments.

THE COURT: Maybe it can be done, but I don't see why they have to restrict themselves.

MR. ROBERTSON: It is probably the easier way to do it.

THE COURT: Don't hammer that.

(p. 23) MR. ROBERTSON: Let me go to the hearsay aspect.

THE COURT: Yes.

MR. ROBERTSON: We have legislator comments. I'll focus on one, because it's a little ludicrous, that are being offered to prove the truth of the matters asserted herein.

THE COURT: That he made the statement.

MR. ROBERTSON: He made the statement.

THE COURT: Yes.

MR. ROBERTSON: From that you are to divine what? That that was the purpose that that person, declarant, had in voting for the act?

Further, you are to divine that that person's utterance during the debate was heard by others.

Further, you are to divine that those others did not evidence a rejection, or if they did, it was not reported.

Further, you are to divine that because they voted for it, they must have embraced it.

Further, you are to divine that those that voted against it voted against it because they rejected it.

I submit to you that that is so attenuated as to be unhelpful.

Add to that that what you have here is less than 14 legislators who were vocal out of 92 who voted originally in both Houses.

(p. 24) THE COURT: Mr. Robertson, what I'm expecting you to do is to bring in all the considerations, why this has an important secular purpose. What is it in the educational values that are in this Moment of Silence that is important for the secular education of students in the New Jersey schools.

There must be countervailing reasons. There must be legislators who have said this is important for proving this, that and the other thing for young students.

Where is it? That's for you to bring in.

These observations—

MR. ROBERTSON: If your Honor is shifting the burden of going forward immediately, then there is no reason for anything. Forget the newspaper articles. We will go on their allegations, and the legislature will bear the burden of proving that its law is constitutional.

THE COURT: No. Assume they make a prima facie case. Then you have to go forward.

MR. ROBERTSON: Judge, what I'm suggesting to you is that on hearsay grounds Mr. Kennedy's remarks—

THE COURT: You're going to relevance, not hearsay. Hearsay is just whether or not he made this statement. That's all the hearsay aspect of it is.

MR. ROBERTSON: The hearsay aspect of it is what is it being offered for?

(p. 25) THE COURT: It is being offered for the purpose of the legislature.

MR. ROBERTSON: What is it being offered for? If you're telling me that I'm going to relevance, and relevance is not a material inquiry of hearsay, then I suggest to your Honor that there is no purpose for the hearsay rule.

THE COURT: Well, I don't follow that, but go ahead.

MR. ROBERTSON: Judge, if it is not a material or relevant issue, there would be no effort to interject hearsay. It is about as important as it rained on the 24th of June. I have evidence of it. I want to introduce it. I stand up and I say, first of all, it's hearsay, and secondly, it is not relevant, what is it being offered for?

THE COURT: If it's not relevant, you don't have to worry about hearsay. But you are arguing, your prior arguments are that it is very impersuasive on the issue of the purpose.

Hearsay is whether this newspaper article is proof of the fact of which it states, which it is.

MR. ROBERTSON: Fine.

THE COURT: The legislators said this. The newspaper article is hearsay. No question.

MR. ROBERTSON: Judge, what purpose in this case does Mr. Kennedy's observations that the founding fathers are (p. 26) spinning in their graves have?

THE COURT: To show that he apparently is distressed about the present situation of no prayers in public schools. Maybe that's what it is.

MR. ROBERTSON: Your guess is as good as mine, because that's the totality of the statement.

THE COURT: All right. Then you may say that's totally irrelevant.

MR. ROBERTSON: And I have.

THE COURT: That's the other part.

MR. ROBERTSON: It's a hearsay statement being offered for the truth of the matters asserted therein.

What, that they did spin in their graves?

THE COURT: No, the truth of the matter is that he said that. That's the hearsay aspect of it.

The fact he said it may not be relevant.

MR. ROBERTSON: Judge, I have used the very same argument that your parroting back to me, not before your Honor, but before many judges where I have said it's not hearsay, Judge, it is not being offered for the truth of the matter asserted therein, only this, the statement, was made.

THE COURT: Well, it is hearsay.

MR. ROBERTSON: It is hearsay, and it's included hearsay. We have set forth our—in our brief exactly why we think it is unreliable hearsay.

(p. 27) The fact that it has been parroted and repeated does not make it trustworthy.

The issue here—

THE COURT: Are you denying that they said this, that they said that?

MR. ROBERTSON: I'm denying that was the full context of the statement.

THE COURT: That's not the same thing.

MR. ROBERTSON: The articles themselves cast doubt on whether that was an accurate quote. Go back to the Kennedy quote.

THE COURT: Then you're debating whether the articles are accurate.

MR. ROBERTSON: Judge, I have to debate that, because I have nothing in the articles. I have nothing in the form of affidavits that indicate that the reporter heard this with his own two ears, that he reported it accurately, that he got the context correctly, that he was present during all of it, that it wasn't part of a rewrite, that an editor didn't modify it, that he put it as it relates to the act in question.

I can't concede those—

THE COURT: Let's cut through all that. Your man doesn't like what was reported. It's very simple for him to come up and say this is what I said and what I didn't say.

(p. 28) MR. ROBERTSON: And waive the privilege.

THE COURT: If he thinks it's that important, yes. Come in here and be forthright and say what he wants to say.

MR. ROBERTSON: That's the Hobson's choice.

THE COURT: Everybody in life is faced with Hobson's choices. So these legislators have Hobson's choices.

MR. ROBERTSON: And I think your Honor has done for me what I wanted to do.

THE COURT: Good.

MR. ROBERTSON: The application here is really an attack on the privilege.

THE COURT: No.

MR. ROBERTSON: It is a use of a hearsay mechanism to undermine the privilege.

THE COURT: No, absolutely not. They have their right to stand silent, not participate in discovery. I've never heard of legislators who wanted to stay silent before, but here it is. It is their rights.

MR. ROBERTSON: Judge, I submit to you, and I ask your Honor, and I know your Honor will do this, that if you review the privilege, you will understand that the privilege is not just a privilege to frustrate litigants.

Indeed, the legislature is frustrated by the privilege.

(p. 29) But what's at stake with the privilege is greater than this particular case or the ability of these men to get on the stand and say I didn't say that, here's what I said, and that's what I meant.

It is that very inquiry, and being forced to that very inquiry, that's at stake here. And that's why they are standing, as you say, silent.

THE COURT: Fine. It is no absolute privilege, as I see it. It is a rule which enforces the desirability of not compelling legislators for leave to leave their jobs to the legislature and go testifying all over the countryside, which would be a totally unreasonable burden.

MR. ROBERTSON: That is one aspect of the privilege. I've cited your Honor sufficient authority that that is only one aspect of the privilege.

THE COURT: I haven't bought the rest of it.

MR. ROBERTSON: All right, you haven't bought the rest of it. So again, I ask your Honor to make a clear ruling on that, in that regard.

THE COURT: There is no need to go beyond what I have already ruled.

MR. ROBERTSON: Then I would ask you this—

THE COURT: Yes.

MR. ROBERTSON: I'm not going to belabor this much more. I've cited O'Brien. I pointed to O'Brien. (p. 30) O'Brien goes to relevance. I think O'Brien is dispositive of the case.

THE COURT: All right.

MR. ROBERTSON: I've cited the rules that pertain to hearsay evidence. I think they are dispositive. I have cited you to our discussion of the legislative privilege. I think that is dispositive.

Now, I ask your Honor for the following; if your Honor is inclined to grant this motion, and to deny our motion to bar this, then I ask your Honor to certify the question.

With all due respect, I think your Honor is wrong on all three grounds, and I would like the opportunity, before I am forced into elections, to have the Court of Appeals review the issue, to determine whether the legislative privilege, as I see it, is the privilege or whether it is as your Honor sees it.

THE COURT: Let me make sure I understand your concept.

Your concept of the privilege is that no court may refer to anything that a legislator has said in the course of its legislative duties in order to ascertain the meaning or intent of a statute. Is that your contention?

MR. ROBERTSON: No sir.

THE COURT: What is your contention?

MR. ROBERTSON: My contention is in a case where (p. 31) the legislators' actions, the legislative action is attacked and the legislature is defending, the Court cannot use—

THE COURT: No legislator is defending here.

MR. ROBERTSON: The legislature.

THE COURT: That's nonsense. Everytime an act is contested, you would have this situation. Everytime an act was—

MR. ROBERTSON: No, Judge, I do not think that you have the situation in every act that is contested.

THE COURT: Why not? What's the difference?

MR. ROBERTSON: On the legislative privilege grounds, you only have it where the legislature is a party.

THE COURT: The legislature is not a party here.

MR. ROBERTSON: They are an intervenor-defendant here, your Honor.

THE COURT: That raises problems about your privilege, which I won't go into.

MR. ROBERTSON: It does not, because at the time we asked for intervention, Mr. Marinari made clear on the record that we preserved our privileges. The plaintiffs were on notice of that and so was this Court.

THE COURT: Well, frankly, I think to me it is incomprehensible, your position.

MR. ROBERTSON: It is frustrating to you, that's what the problem is.

(p. 32) THE COURT: No, it's just I think you're claiming something so broad for the privilege that it extends beyond all reason.

This isn't—has nothing to do with the legislator being held criminally liable. It has nothing to do with legislators being sued civilly in any way.

This is simply a question of constitutionality of a bill, very simple suits. The answer may be difficult, but the suit is simple.

No attack on any legislator. Simply voted for or against the bill. And now the bill is under question.

If you think the Court can't refer to what was said during the course of the adoption of that bill because of some privilege, to me that just boggles the mind.

MR. ROBERTSON: Apparently, Judge, you don't agree with me, but I think the Third Circuit has outlined the scope of the privilege very clearly. The privilege calls for the nonevidentiary use of legislators' statements.

THE COURT: You are going to give a privilege for legislators of New Jersey which New Jersey itself doesn't give?

MR. ROBERTSON: New Jersey courts have not addressed this issue.

THE COURT: But what has the federal law got to do when the state itself, the Supreme Court in the state, has (p. 33) referred to what the legislators have said and relied on it as evidence?

MR. ROBERTSON: The Supreme Court has not addressed the issue.

THE COURT: But this is New Jersey law we are applying.

MR. ROBERTSON: The only case that you can point to, Judge, in all due respect, is Raybestos-Manhattan.

Judge Lenox is just wrong.

THE COURT: I think he's right. And it's state law.

MR. ROBERTSON: If you examine Judge Lenox's authority, you will find that he is wrong, and you will find the authority he relies on is consistent with O'Brien.

That authority indicates that when the Court, in aid of legislation, is in need of some interpretation, it can look to recognized legislated sources, normally, committee reports.

Never does the Court impeach the clear language, unambiguous, of legislation by selecting from floor debates fragments, utterances of less than the whole.

That's what your Honor is being asked to do here. Raybestos does not stand to the contrary.

The cases Raybestos relies on do not stand to the contrary either, Judge.

(p. 34) THE COURT: All right, let me rule on the motion.

MR. ROBERTSON: Judge, could you include in your ruling, if your Honor please, a certification of the question?

THE COURT: I doubt it. We are heading for trial. We can send all the questions up at once which would be more efficient.

MR. ROBERTSON: That forecloses me from making strategic and tactical decisions. Your Honor said it already.

If I'm wrong, then I have to turn to my clients and say, gentlemen, I'm wrong, you're wrong, we have to go see Judge Debevoise in Newark.

If I'm right, I don't have to make that choice.

THE COURT: All right.

This is a motion in limini which is brought by the plaintiffs seeking a ruling on the admissibility of newspaper accounts of events leading up to the adoption of Assembly Bill 1064, Public Law, 1982, Chapter 205, New Jersey, supplementing Chapter 36 of Title 18A.

In good measure, the articles concern statements by legislators during the period when the bill was being considered for adoption by the legislature.

The plaintiffs seek to introduce the various newspaper articles, editorials and other materials without the necessity of bringing to court the newspaper reporters who wrote the various articles.

(p. 35) MR. ROBERTSON: Your Honor, please excuse me, because I have to interrupt. I don't want your Honor to make an unnecessary ruling.

I'm going to—

THE COURT: Please sit down. When I'm giving an opinion, sit down.

MR. ROBERTSON: I was going to say—

THE COURT: I know, you're not contesting authenticity.

MR. ROBERTSON: I wanted to concede something else, a necessity that I failed to talk about, and that is, if your Honor is going to introduce the statements as contained in the newspaper articles, I am not going to put the plaintiff to the burden of calling these newspaper reporters.

I wanted to concede that. That's why I thought I would mention it.

THE COURT: That goes to authenticity.

MR. ROBERTSON: My apologies for interrupting you.

THE COURT: The case itself attacks the validity of the act in question on the grounds that it violates the

Constitution of the United States, Article First, prohibiting the establishment of religion.

The tests which would be imposed in determining the validity of the statute under applicable law are (p. 36) three-fold.

First, it must be determined whether the legislation was primarily secular in nature, or whether it had a religious motivation.

Secondly, it must be determined whether principal or primary effect of the legislation is secular or religious.

Thirdly, it must be determined whether it involves an undue entanglement by the state with religion.

In determining all of these questions, it is important and significant to establish, if possible, the overall public perception of the activity mandated by the statute as secular or religious in nature. This would go to the purpose, to the effect and to the question of entanglement with religion.

The kind of evidence which will be pertinent in making this inquiry is mutiple in nature. It will be important to acertain the context in which this legislation was adopted. By context, I mean the place where the legislation will be applied, that is, whether it's in schools where impressionable youths are concerned with its implications, or whether legislation of this nature is to be applied in places where adults are involved, such as legislatures or courtrooms.

Another context which will be important is that in which the legislation was enacted. The particular problems (p. 37) and social situations, debates, arguments,

contentions which were involved both in the legislature and in the public mind at the time the legislation was adopted.

Another area of inquiry will be the historical context in which the legislation was adopted. What were the legal currents? What were the social currents which gave rise to this legislation and which resulted in its enactment?

Another area of inquiry will be into the groups and the individuals supporting and opposing the legislation, what the reasons were that they advanced for opposing it, what the reasons were advanced for supporting the legislation.

Another area of inquiry will be the similarity or dissimilarity of the practices mandated by the legislation to traditional concepts of religious or nonreligious activities.

As previously mentioned, an important area of inquiry will be the public perception of the legislation, its purpose and its effect.

In establishing public perception, I will be interested in expert testimony. That will be pertinent. Letters to newspapers and public officials will bear on this question. Comments by officials, by religious leaders, by private citizens, this would bear on the question of public perception. Newspaper articles, magazine articles, editorials, these would bear on the public perception of the purpose and effect of the legislation. Public opinion polls (p. 38) will be relevant in this connection.

Turning to the particular issues of this motion and the evidential nature of the newspaper articles which will be offered in evidence, first it can be said, as the intervenors have agreed, there is no problem with authentication of

such articles. Federal Rule of Evidence 902(6) provides for self-authentication of newspaper articles and periodicals.

I would note the form in which some of the newspapers and articles were presented on this motion leaves something to be desired, and may have to be cleaned up, or further amplified so that it is obvious from the face of the material that it is from a given newspaper on a given date.

As to the other evidential problems, for a number of the purposes which I alluded to above, the newspaper articles are not hearsay evidence at all. They are simply proof of themselves. That is, proof of what the public is saying, what the public is hearing, what is being circulated, ideas that are being circulated among the public.

This does not require a hearsay exception in order for it to be admissible. It is evidence of what it is and that may be used as evidence of what the public perceives the purpose and effect of the bill to be, and from that, inferences can be and have in prior cases been made as to what the actual effect of the bill may be.

(p. 39) If the articles are being introduced as evidence of what the legislators themselves actually said, they are hearsay, and I conclude that they are within the exception to the hearsay Rule 803(24). They are statements not specifically covered by any of the other exceptions to the hearsay rule. They do, however, have equivalent guarantees for trustworthiness. The guarantees of trustworthiness arise from the fact that there are multiple instances of reporting the specific statements made by legislators.

These multiple instances tend to verify the accuracy of each other. If there were an isolated statement which was of significance in itself, it might well be that the trustworthiness would not be sufficiently great to permit this kind of proof. But this is evidence of a general kind of statement having a general purport, which generally is the same throughout all of the reports over a significant period of time, which constitutes a mutually establishing reliability.

Similarly, the failure over a significant period of weeks and months of any purported maker of the statements to deny, disavow or discount, modify the statements generally being distributed is significant as to the aspect of reliability that the statements were in fact made. I think the circumstances are such that there is considerable reliability to them as to the fact that they were indeed made. (p. 40) The statements are being offered in evidence as evidence of a material fact.

Traditionally, courts in New Jersey and elsewhere have looked to statements of legislators as an indication, at least, of the general purpose of the legislation. It is not conclusive. What any single legislator may say will not bind the entire body. Legislation is a collective act, and no statement by any one legislator can itself be taken as that of the collective body.

However, the reports of the legislators' statements, other material of this kind, has been examined by courts in New Jersey and elsewhere in the federal courts as at least an indication of one element of the proofs of what the purpose of the legislation was. Of course, here under the Supreme Court cases, the purpose is a highly material element of the case.

The next criteria under Rule 803(24) is whether the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.

As I previously held, there is a public policy against permitting testimony, requiring testimony of legislators concerning their public duties. Public policy, at least, limits the taking of their depositions, exposing them to discovery, and that policy has been implemented on their (p. 41) own motion in this case to exempt them from responding to depositions, from answering interrogatories and responding to requests for admissions. Thus, the plaintiffs in this case are barred from the usual source of finding out what somebody said, by asking that person, and must, of necessity, go to other sources of the information and proofs. This, I think, brings the statements within Rule 803(24)(b).

It could be argued that they should bring the reporters in who heard the statements and ask them to repeat what they heard the legislators say. This seems an unduly burdensome and cumbersome method of proceeding, and in all likelihood, would produce nothing more than reference to their notes which were incorporated into the articles themselves.

The third requisite under Rule 803(24) is that the general purposes of the Rules of Evidence, the interests of justice will best be served by admission of the statements into evidence. That is the situation here. The general purpose of the rules is to have truthful, accurate information on material issues. That is what this will be, subject, of course, to any specific article through objections on rele-

vancy as to any particular statement which is contained in it. The interests of justice suggest that we proceed in this manner. It is an expeditious way of obtaining accurate reports of what the legislators have said without compelling the legislators to subject themselves to discovery or other (p. 42) burdensome efforts which would take them away from their public duties. Thus, I conclude that the statements are clearly admissible under 803(24).

The objecting intervenors have again advanced the issue of privilege asserting that the courts may not consider these statements at all, since to do so would violate the privilege of the legislators, which they are apparently afforded under New Jersey and federal law.

I see not basis for this claim in New Jersey law. We are dealing with New Jersey legislators. I note that the courts of New Jersey have referred to statements of legislators of New Jersey in ascertaining the intent of the—any particular act in question, and have not held that the legislators are somehow immune from having their statements examined in a court proceeding, which is looking to the meaning and intent and purpose of particular legislation.

I forgot to mention one reason for the inaccessibility of the—this kind of evidence—the fact that New Jersey, unlike the United States Congress, and unlike some state legislators, does not have a system of maintaining a record of legislative activities. Consequently, this commonly used source of information as to the purpose of legislation is not available to the plaintiffs in this case, which is another reason why it is necessary to go to the public press for

reports of what the legislators did during (p. 43) the course of adoption.

The intervenors have asked that I certify this evidential question for the purpose of appeal at this time. I decline to do that. I don't think there is any legal basis for saying there is a legislative privilege here.

The trial is almost upon us. This issue can be raised there. I appreciate that the intervenors think they may have to make some tactical decision. They are in no different position than if I made this decision at the trial, which I could have done. They could face it at that time. They can take their appeal from the whole case.

I think, obviously, this case is going to be appealed, and I think we ought to put it in the posture where the entire matter can go forward rather than a piecemeal appeal on evidential rulings. So, I will not certify the case for appeal.

All right, anything else?

MR. ROBERTSON: Mr. Altman will submit an order?

MR. ALTMAN: YES.

THE COURT: Yes.

MR. ROBERTSON: A matter of housekeeping.

Your Honor noted that the copies of the articles that we received—mine are very bad in many instances—

THE COURT: Mine are too.

MR. ROBERTSON: I would like to get some clean (p. 44) copies as soon as possible.

THE COURT: I think we ought to have articles—perhaps it can show the front page of the paper from which they came, and then the article itself that you're concerned with, just for authenticity purposes and to be sure we know where they came from.

MR. ROBERTSON: Just for readability.

THE COURT: Yes, readability.

All right, let's move on then. I guess it is May 2nd or 3rd—

MR. ROBERTSON: May 13th.

THE COURT: May 13th.

MR. ROBERTSON: Judge, while I'm here, I would like to ask the Court to reconsider the May 13th date. I know that your Honor's schedule—you mentioned this at the status conference—doesn't permit us to have but one day on May 13th.

THE COURT: You need more time?

MR. ROBERTSON: Only the following, Judge, the State Bar Association meeting is on that weekend.

THE COURT: The weekend before or the weekend after?

MR. ROBERTSON: The 14th. And I was wondering, depending on your Honor's schedule, obviously I'll be here on the 13th if that's what you want to do, but since we can only (p. 45) get one day in on the 13th, unless Mr. Altman has a particular problem, I would like to be able to move it off until the next week if that does not—the next week being the 16th or the 17th.

THE COURT: No, I have a problem with the next week. I've committted it to other people who are in the courtroom now. So I wouldn't dare let them—

MR. ROBERTSON: The other problem is we have about 20 or 30 depositions scheduled already.

THE COURT: Let's leave that open. Let's see where you are.

MR. ROBERTSON: I wanted to bring that up.

THE COURT: I'm not totally inflexible. But if you think you are not going to be ready, let's look at it after a bit of time has gone by.

MR. ROBERTSON: All right.

THE COURT: Good. Thank you very much.

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EXCERPTS FROM TRIAL TRANSCRIPT

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(p. 13) MR. ROBERTSON: No, Judge. The understanding was that plaintiffs, not witnesses—and I point to Dr. Younger and Dr. Sarfaty, who had been identified as being witnesses here.

I object to the affidavits of both of those.

MR. ALTMAN: That's fine.

THE COURT: All right, just plaintiffs.

MR. ROBERTSON: With one addition. There was one plaintiff who was not listed in the complaint, but whose affidavit was submitted. I believe her name is Mrs. Rotberg. We agreed to have the stipulation cover her as well.

THE COURT: The plaintiffs plus Mrs. Rotberg's affidavit will be treated as if those persons testified to the effects set forth in the affidavit.

MR. ALTMAN: I'll prepare a list and submit it, your Honor. And we agree that Dr. Sarfaty, S-a-r-f-a-t-y, and Reverend Young, they will both appear as witnesses.

THE COURT: All right, fine. Any other preliminary matters?

MR. ALTMAN: I don't think so.

THE COURT: All right. Call your first witness.

MR. ALTMAN: Doctor Langdon Gilkey, your Honor.

THE CLERK: Place your left hand on the Bible, raise your right hand.

* * *

(p. 20) Gilkey—direct

MS. MC HUGH: Plaintiff's Exhibit Number 73.

THE COURT: All right, P-73 in evidence (Exhibits marked Plaintiff's Exhibit 73 in evidence.)

MR. ALTMAN: Your Honor. I submit Dr. Gilkey as an expert on theology. I'm prepared to go into the substantive testimony.

MR. ROBERTSON: No voir dire, your Honor.

THE COURT: All right, you may proceed.

Q Are you familiar with the statute that is known as the Moment of Silence that has been referred to at times as Assembly Bill 1064?

A I am.

Q You have reviewed it?

A Yes.

Q And for what purpose did you review that statute?

A In order to state my opinion, I presume as an expert, about the meaning and effect of such a statute in the life of the school and the state.

Q Did you reach an opinion to that effect?

A Yes, I did. I will subsequently seek to argue this, obviously in my testimony, that the primary result of such a requirement or such a stipulation that there be a Moment of Silence will be that it will be used as a mode of prayer and that this mode of prayer being particular—not universal, but a particular form of that, of, so to speak, spiritual (p. 21) act—will exclude other forms, other similar forms, and will therefore be divisive within the total community in the life of the school and the life of the larger community.

Q Now, you understand, in rendering that opinion, that the Moment of Silence as it is written on its face mandates a moment of silence, but addresses or suggests that contemplation or introspection are to be voluntary?

A I understand that, right.

Q And it is your opinion that the effect of the statute will be a prayer or will result in prayer in the public school?

A The major use of it will be for that. That the primary result will be that we will see acts of prayer in, generally, in classrooms where this is done.

Q You said particular type of prayer rather than prayer in the generalized sense. What type of prayer are you referring to?

A Well, that's a rather complicated matter which I would like to get into subsequently. But an objective act of prayer is, I think, going to be the primary result of this Moment of Silence.

It will be particular in the form that this will be a —what—a Christian, possibly certain kind of Jewish prayer, which I will explain subsequently, and will not be the form of spiritual act that other communities find appropriate.

(p. 22) Q And do you have an opinion as to whether this prayer will have the effect of enhancing spirtual or religious life in the community at large?

A I think that—I think that it will have one effect of, so to speak, advancing religion, and that's one thing that I find inappropriate on the part of the schools.

On the other hand, I'm prepared to argue that a required act has only dubious spirtual results. That's a somewhat paradoxical statement, but I think that any establishment of a spirtual action or establishment of religion advances religion in the sense the courts have found objectionable.

On the other hand, I believe firmly and am prepared to argue here that such stipulations, such establishment, don't have the effect they want to have, namely, to improve the spirtual life of the community.

Q Doctor, I would like to take you now into the basis and the reasoning by which you reached those various conclusions.

A Um-hum.

Q And since we are talking about religion, can you begin in a nutshell, so to speak, or in a simple way, can you define religion, the word "religion" for us, that would apply in a— in the context of the Judeo-Christian heritage or others that you have mentioned, such as Buddhism, Confucianism, et cetera?

A Religion is recognized as very difficult to define (p. 23) because of its almost infinite variety. There is a good deal of argument. This is a controversial thing to do, to define religion, but, nevertheless, the courts and people commenting on civil life and people in the field of religion have tried in some way to make such a definition. This is clearly controversial.

I would suggest that religion includes a view of reality, of what is really real, of ultimate reality, especially with regard to the human predicament and the resolution

of that predicament. I will make that clearer, I think, in a moment.

That it includes along with that view of what is real, what the human situation is, a way of life; that it proposes to its adherent and to which they assent, and that this view of reality and this way of life are thirdly borne by a community, community over time. It is not an individual matter. It is always represented by a community.

Q So it is your testimony that these three aspects, a view of ultimate reality, a way of life, and a community that holds to this way of life and view of reality is a definition that would apply to religion generally?

A I find it applicable to everything we call religions.

Q Okay.

A Whatever the content of that view of life is, of reality is, whatever the content of the way of life, and (p. 24) whatever the structure and character of the community.

I think anything that we call a religion has those three elements, and that anything that has those three elements is ipso facto a religion.

Q Can you expand briefly for us what you mean by an ultimate view of reality or what is really real? What do you mean by that?

A Well, let's contrast that with what one would call a psychological view of—there are many psychological views, or views in psychology that talk about what's wrong with us. But they don't present to us a view of nature,

of history and of all the things that make up whatever there is.

I think every religion does present such a view. It may be very restricted, but then the culture is restricted. It is primitive.

But if you look at the major religions, Buddhism, Hinduism, Judaism, Islam, Chirtianity, so on, you will find them in very different ways talking about what is real, what the universe is made up of.

Though they don't follow that out, nevertheless what's central to their religion, in our case God, is regarded as the source of reality. That's what I mean as the most real thing there is.

I think that this is true of every religion. When they talk about their gods, whatever they are, these are (p. 25) very important in reality, very basic to reality.

Q By way of life, would you expand on that?

A This, again, would be very various. It could be a very esthetic way of life, as in some forms of Hinduism and Buddhism, and in some forms of Christianity and Judaism.

It will involve the behavior of people who are the adherents and included in that way of life will be a way of relating to reality; by worship, by mediation, by contemplation, by prayer, so forth. This will be part of the way of life. It won't necessarily be what we call ethics, but it will be very important to it.

For example, in Islam, the requirement to pray is very basic to the life of a Muslim. And in forms of

Christianity, the requirement to be a participant in the sacrament is very basic.

So involved in the way of life would be a way of relating to reality. This, of course, this is where the issue of prayer comes in very fundamentally in religion.

Q Am I mistaken or did you refer in your testimony to redemption as a way of life?

A Yes. Philosophy is interested in the character of reality, but—and it differs from theology, which is also interested in that, in the sense, it seems to me, that religious thought tends to zero in on the human problem and the answer to the human problem. This is its primary concern. (p. 26) It may use philosophy, but it is not interested in spinning out theoretical problems, but talking about what's wrong and what the answer is. Perhaps redemption through Jesus Christ, obedience to the law, nirvana, so forth and so on. These are all central to a religion.

You can whiff of religion whenever you've got that concern with resolving the basic human problem.

Q I think that your testimony as to a community of believers holding these views is self-evident. But can you relate these three components of your definition of religion to our Judaic-Christian heritage?

A That's a particular form of religion, though the tendency is for any culture to think its form of religion is a universal form. We are inclined to think that all religions worship God or something like this. Actually, they don't.

But when one is talking about the western context which has been, of course, predominantly influenced by

the Jewish, Christian and the Islamic traditions, all of them coming from the Hebrew tradition, stemming from that, our forms of religion are dominated by the figure of God. All that is religious has to do with God.

This is, what shall I say, the practical result of the First Commandment, thou shall worship God alone. Everything religious relates to God in all these of these faiths.

(p. 27) In fact, if you do something religious not related to God, you're involved in blasphemy, idolatry, so forth and so on. It is a very clear point.

So, we associate relationship with God with everything religious.

This isn't universally so. Early Buddhism and large parts of Buddhism don't have any predominant deity, but they are religious. That's one reason the definition has to be broader.

In the western context, certainly God is absolutely central, and the force of that with regard to our case is that a relationship to God, therefore, is the epitome of a religious act. Therefore, that is the way that a person personally comes into an act, so to speak, the relationship to God. That is what prayer is.

In Islam, in Judaism and in Christianity, this is its function. It's not the only way one is related to God.

For example, the sacraments in the Catholic tradition are clearly very, very definitely relationships to God, but it's quite central.

Q So that in our culture, prayer by definition is always a religious act?

A That's correct. And for the reason I've given, because it is a relationship to God and that that, so to speak, one might say that not everything religious needs to be a (p. 28) relationship to God.

As I've said, there are religions that don't have a figure of God in them. But everything related to God is religious.

Q Well, in other areas of the world which are not influenced by the Judaic, Christian or Muslim tradition, the Far East, prayer is utilized?

A Yes. Well, one can say that prayer does appear in almost every religion. It may not be absolutely central to the life of the religion, but it is very hard for a religion to develop communally and historically without having some level of prayer. And in our traditions, as I've said, in the three traditions I was speaking of, since the divine is personal, and the relationship, therefore, is one of—how shall I put it—speaking and personal dialogue, if you will, as central, then prayer takes a very central role.

In other traditions, where the divine is more impersonal, meditation and contemplation may make—may take a very central role in relating to the divine.

I'm thinking here of Hinduism, Buddhism, and to some extent Sikhism, though, like us, it is both.

But on other levels of those—where one might call a popular level, there might be many acts of prayer, in both Buddhism and Hinduism to particular deities.

Q Let me flesh that out a bit.

(p. 29) First of all, do you use the term contemplation?

A Yes.

Q And meditation interchangeably?

A In this context I am, yes.

Q Okay. And you are saying in other religions, or are you saying in the western religions as well, contemplation and meditation is a form of prayer or can be? What is your testimony on that?

A No, I wouldn't—one could say that, but then you're stretching the word "prayer" so that it loses its particular force, it seems to me.

It is a way of relating to the divine, put it that way. Though the moment you say that a Buddhist will come along and say we don't recognize anything as divine, but meditation and contemplation are central to Buddhism.

What I was specifying was the highest level, the most elited levels are contemplative and meditative, and it is, so to speak, other levels, both of the life of this person we are thinking of and on the life of the whole community that pray that prayer to particular deities might take place.

Now, meditation and contemplation are central where the divine is impersonal. I don't mean to be perjorative there, and we shouldn't be.

Q Central to a religion?

A To the life of the religion, where the divine is (p. 30) perfect, and where it is imminent, as we call it.

That is present in the self, present in experience, so that by stopping to think about streetcars and my job and what's going to happen tomorrow and sort of clearing the mind, the mind can relate itself to the divine and become identical.

This is the function of Yoga, of meditation, of contemplation, in these religions.

In this sense I don't want to say it replaces prayer, but it is certainly a way of relating one's self, one's whole being to the divine. This is the religious use of contemplation and meditation very clearly.

Q What would be some of those religions?

A Hinduism, Buddhism, primarily.

Now, interestingly, there have been and still are mystical wings, so to speak, mystical elements within the semetic traditions, within Judaism, within, especially, Catholicism, though also among the Quakers and among persons in the Christian tradition and in the Islamic tradition, a group called the Sufis—probably many people have run into the Sufis—where immediate meditation and contemplation, a kind of spirtual unity with the divine is sought for.

Now, I think most of us agree these are not—that Judaism and Christianity, Islam, are not normalitive mystical, so to speak, but there are mystical elements in (p. 31) them. In those cases meditation and contemplation are very fundamental. Anybody who is a Roman Catholic or Greek Orthodox knows very well the basic part of that tradition is mystical, contemplative and so on.

Q Can you give us—strike that.

Does contemplation have a traditional role in more mainstream religions in western culture, for example Quakers or—

A The Quakers have developed a mystical element within their life and almost every tradition, Lutheran and so forth has as well.

One might say the Calvinists are particularly, I won't say barren, but they haven't been interested in the mystical particularly.

I don't think Protestanism has been, on the whole, as mystical as Catholicism.

Q What about the term "silence" as a spirtual or religious act in our heritage? Can you expand on that or give us an opinion?

A Silence has always been very important in religion, though it is not necessarily predominant. That is to say where you have, again, a conception—perhaps that's too intellectual—where the divine is personal, speaks to us from the scriptures, speaks to us from the word preaching, speaks to us through the law, and we reply in prayer or in (p. 32) acknowledgement and so on, then silence is apt not to be a central point.

Where contemplation and meditation and, so to speak, a nonintellectual, nonethical relationship to the divine is predominant, then silence becomes much more basic.

I think silence is very much a part of the paraphernalia of religion, but not absolutely central.

Q Going back to the Quakers, would silence have a greater role among Quakers?

A It does, obviously. That is, within silence the inner light comes. I hesitate to say speaks, that's a little bit of a mixed metaphor, but silence is certainly very productive there.

This is significantly different than a community built upon preaching, for example.

Q In contemporary, so to speak, 20th Century America, have other religions become more influential or more involved in America or New Jersey, as opposed to the Judeo-Christian heritage?

A Well, I think it is generally agreed by a number of observers, and I guess participants, that the last 20 years have witnessed an astounding growth of nonwestern or nontraditional religions in the life of, especially America, but also other parts of the west.

One might put it that the missionary flow is (p. 33) going the other way. That is to say, instead of western religions moving across the oceans to India, to China, to Japan, so on, the tide is going the other way, and certainly predominant in the religious life of the United States, has been the appearance of Zen, Yoga, forms of Hinduism, forms of Sikhism, as well as various religions that have delevoped within the 20th Century.

There are additional religions that have come in much greater numbers to our common cultural life and into religion.

I suppose one would say the Moonies are a new form, whereas Zen, Monasterial, Sikhism, various forms of Hinduism or traditional in their form.

What all of that means is another question. But the fact, the evidence, is very clearly there. We are a much more pluralistic culture religiously than we were before. This includes Islam, both the Black Muslims and other forms of Islam. Sufism, for example.

Q In the beginning of your testimony you indicated that it was your opinion that the Moment of Silence would most likely result in what you called objective prayer. You made reference to religion as particular, not universal, not general.

Would you expand on that and tell us what you meant?

(p. 34) A Yes. I think that it is important to remember that while religion is universal, apparently in culture, even where a culture like modern Russian culture seeks to get rid of it, it keeps coming back. But, nevertheless, the forms of religion are not universal; that is, every religion that appears is a particular form.

Each culture tends to think that its forms are universal, but they turn out to be quite particular. Jewish, Christian, Islamic, western and so forth and not eastern.

And so I would suggest that every religion that appears concretely in history is always a particular form of religion.

In this sense, religious ideas are as particular ideas. They have a Christian background or a Jewish background or a Buddhism background and reflect that particular background.

Religious obligations are particular, and in this sense which is relevant here, forms of religious action are particular.

Now, with regard to our subject, this means that what we would associate with an act of prayer is very particular to our cultural and life with its particular religious traditions.

I'm thinking here of what we call a prayerful attitude which means bowing the head, closing the eyes, (p. 35) clasping the arms, being silent and so forth and so on, and we assume this is universally what people do when they pray in public.

Q That's not so?

A And this is not at all so, I think, and a good many others. This form of behavior which we associate with prayer, you go to an Alabama football game or Rotary Club meeting, whatever kind of thing, this is what happens.

This, I think, is associated with the development of Protestanism from that in the 17th and 19th Centuries. Let's say it spread out into reform Judaism, and into, clearly, a lot of modern Catholicism.

However, historically Catholics would have knelt in order to pray. Jews, historically, would have raised their arms this way and their eyes in a quite different way as we all know.

Islamic people, when they pray, make a sacred space for their rug, purify themselves, get down and prostrate and call on Allah.

If you go to—this is not a moment of silence. Real Islamic prayer in that moment of silence would be quite noticeable. Let me put it that way.

In Japan, Shinto person claps their hands in front of the deity. If you ask them why, they will say to wake him or her up and call attention to it. That, generally, (p. 36) would be quite a different way of prayer.

This is part of what I meant by this, by the particularity of it. This seems to us very general, but people from those traditions to wish to use this moment in this way would find themselves unable to use it that way. Whereas people from a Protestant background, or a Catholic background or Reform Jewish background would be able to use it.

In this sense it is particular and I think divisive.

Q So that when you gave your opinion that the moment of silence would result, in your view, in prayer, I take it that you're saying particular prayer for particular groups?

A Yes.

Q Excluding others?

A Since our population is filled with many types of religious life, different from the main line types, it is not—a moment of silence is not appropriate for all of them to use freely in exercising this.

This is—this specifies when you require and establish a particular form of spiritual life, you're establishing a particular form, and, therefore, excluding the free exercise of other groups.

This is the relation of the two.

Q Why do you think that the moment of silence in the (p. 37) context in which it was expressed in the statute

would result in any form of prayer, even the traditional Protestant or Catholic or Jewish prayer?

A Well, that's a rather—that calls for a rather complicated answer. It is a rather important answer, it seems to me.

My own perception, having read a good number of the statements involved in the introduction of this legislation, would indicate to me that the intent or purpose of the legislation on the part of many of the persons, in fact, all of the persons who pushed it, was to bring prayer back into the school. That's one side.

As a citizen reading this, reading their statements and so on, this was my perception of what was going on.

Secondly, a moment is only a moment. To anyone familiar with contemplation or meditation, or even, let's say, introspection—and introspection can be secular. I'm not denying that at all.

As I tried to indicate, meditation, contemplation and introspection certainly can be religious, in fact, are very important to religion, whether one is speaking of prayer or contemplation or what have you; the examination of the self, the quieting of the mind, the concentrating on something or other that one associates with meditation and contemplation (p. 38) are absolutely basic.

But meditation and contemplation and especially—in the sense of introspection, can be secular. I'm not at all denying that.

There one is thinking of one's self and one's thinking of one's relation to other people; one's thinking of one's

work in the world; one's thinking of one's possibilities. There are all kinds of things, so to speak, worldly things that one can be speaking of. This is a secular activity. I don't think we are involved in denying that.

Now, my point is that if one is speaking of any—I'll mention all three of these things, any serious form of prayer, that is to say, an inward form of prayer, or one is examining one's life in relation to God, examining what one has done in relation to God, affirming one's trust in God, praising God, so forth and so on, this is not a momentary activity. This ~~is an~~ activity that spans several moments of time at the least, and demands a good deal of inward activity.

In that sense prayer with a subjective component is something that one cannot conceive being done in a mere moment.

Q Isn't that true also of any secular substantive meditation or contemplation?

A Meditation and contemplation of any serious sort take certainly a large span of moments. They—incidentally, they (p. 39) are usually done not in—standing up, but in a seated posture. The mind is quieted down, the body is quieted, and then contemplation and meditation take place.

Now, my suggestion is also introspection as any kind of—what sub—substantive act, at whatever level of maturity we are speaking about is not momentary either, where the self sort of brings itself together, reverses its immediate situation and so forth and so on. Introspection in any secular meaning is a much more substantial activity than a mere moment.

For this reason I suggested that the major use of such a moment would be something that can be done in a moment, namely, what are called objective prayer, the acknowledgements of deity, closing of the eyes, bowing of the head, the inward recognition of deity, and then it is all over.

That kind of prayer is certainly very common in religion. I'm not implying there is anything wrong with it. It is significantly different than praying personally, so to speak, where one is really dialoguing with God. It is very different from a serious meditation and it is very different from introspection.

That's why I have suggested that the major use of the moment of prayer, a moment of silence, would be this type of objective prayer where people close their eyes and recognize the deity and then the moment is over.

(p. 40) And I, having read the—what shall I say—the statement surrounding the legislation with regard to prayer, with regard to the schools, with regard to the need of bringing prayer back into the schools, statements which certainly were made, it seems to me this is what they had in mind, this type of objective prayer.

Q Are you saying that because it was published, so to speak, or manifested to you from these type of statements, that this was what was in the mind of the legislature, that that would necessarily result in people utilizing that moment of silence for that purpose?

A Well, I am aware as a reader—I hesitate to say of Chicago papers, but certainly of the New York Times—of movements over the past years, few years, of introducing prayer into the public life, and especially into the schools,

amendments to that effect as well as amendments to declare us to be a Christian nation.

Now, this is what I mean by objectivity. This is like In God We Trust on the coin. You don't have to feel anything. It's there.

This is —this has been so prominent that one can hardly avoid it in our national life.

I have assumed that the motion—the movement, the social movements, both legal, legislative, so forth, that led to this law, was a part of that.

(p. 41) And I, as a person interested in religion, and knowing something about it, I'm suggesting what form of prayer is here being sought after, so to speak, though it is clothed, it seems to me, in the words of meditation and contemplation and introspection. I'm suggesting that those words hardly fit the moment, whereas objective prayer does.

The kind of subjective prayer one finds in, say, Pilgrim's Progress or in many of the psalms, to take two examples, that can't be done in an objective moment. No question about it.

Q Does the fact that this statute mandates the moment of silence at the beginning of the day play any role, or does that influence your thinking in terms of conclusions you've reached?

A Well, I suppose the most appropriate way to take—express my feelings is that lots of things fit together here, as far as I can see. And historically it was the case, and still is the case in many, what, private enterprises, so to speak, that things begin with an invocation, a prayer.

I don't wish to register, obviously, any objection to that. I do think it is inappropriate in our public schools and in our life and so on.

But the positioning of this at the beginning certainly suggests this historic habit and this still common habit of beginning important activities with a moment of (p. 42) objective prayer.

This is, I might say, more objective than most such beginnings because in most of them we ask somebody with supposed spiritual authority or eminence, a rabbi, priest, a minister, to state a prayer while we bow our heads, that is, to pray for us, in effect. But still, that is the kind of active prayer that I'm thinking of here, and I think that this is what is intended.

Q I think you mentioned it, but it bears repeating. You alluded to a moment of silence or a prayer at the outset of an Alabama football game or some other private forum.

A Yes.

Q Are you saying that the format which this moment of silence takes replicates or in some way mimics forms, moments of silence, where we generally utilize them as prayer in this country?

A Reproduces. Perhaps mimics is a word that has other intonations or connotations to it. It certainly reproduces it. And for those who saw this as a way of bringing prayer back into the schools, I think it—the reproduction is what was intended.

I certainly expect that in many particular situations in the schools this will, in fact, be a moment of silent prayer.

Q You indicated that you have read articles attributing (p. 43) various statements about—to the legislators that they intended—I assume you're referring to states, that they intended to bring prayer back into the school?

A Um-hum.

Q Can you tell us where you read some of those articles?

A In the papers.

Q Did you also have an opportunity to review our trial brief?

A Yes.

Q And appendix?

A Yes. Yes, of course, I read them there.

Q And, of course, those contained duplications of many of those statements?

A Right.

Q Do you recall reading that various legislators said that they wished to to reintroduce prayer into the school because they thought it might improve the moral fabric of society? Do you recall that?

A Yes.

Q And that if they reintroduce prayer, people would come back to God and religion, and they suggested that we were falling away from religion.

Do you believe that contemporary 20th Century American society is falling away from religion?

A It all depends on what's meant by that question.

(p. 44) As I've indicated already, I believe that the second half of the 20th Centry has been, to the surprise of

most commentators, a religious half century, and increasingly so.

Religion, instead of declining—and this would be over a long period, as commentators at the end of the 18th during the 19th and during the first half of the 20th Century, it was fairly agreed by everybody but religious people that religion was on the decline as modernity developed, and modern culture developed.

I think this has turned out to be wrong. I'm not saying that's a good thing because religion is a very dangerous matter. It is dangerous as well as creative. But there is no question that religion is on the rise.

Conservative form of religion is on the rise as well as these novel forms to our culture. Different formation, sectarian forms, we would say, though, remember, a sect here is—might be the established religion somewhere else, like Hinduism so forth and so on. So that I think that religion is on the rise in American and in Western culture generally.

One might say it has not penetrated into the academic world in any particular sense, except among graduate students and college students. But, nevertheless, in population as a whole, I think one can say this.

(p. 45) If one means religion is on the decline in the sense that the traditional religion are having a little bit of a hard time, the main line traditions, reform Judaism, Presbyterianism, Episcopalianism, so forth and so on, perhaps Roman Catholicism, one can say that can be so.

Fundamentalist, Pentacostal groups, again, I'm trying to be descriptive, not perjorative, has certainly been growing faster than the main line traditions have.

All three of them have lost many of their youth to various other religious groups, to the Unification Church, to Yoga groups, so forth and so on.

So it all depends on what you mean. But religion is certainly not on the decline at the end of the 20th Century. No question about that.

THE COURT: I'm not sure I understand the relevance whether religion is on the decline or ascent to this case.

MR. ALTMAN: I think that there have been numerous statements by the legislature that the moment of silence was intended to bring back some moral fabric into the schoolrooms. That's my next question, an opinion on that. I would like to demonstrate, I think it is important, not only for the case, but I think it's important publicly to make the point that this case isn't anti-religion.

The reason for the First Amendment, the reason we (p. 46) are seeking to enforce it, is to demonstrate this moment of silence is not an efficient or effective means of trying to bring back moral fabric; that it will actually have a denegrating effect on religion. That's my very next question.

THE COURT: Well, I don't—what you're trying to do it seems to me is suggest the legislature could find more effective ways to bring back religion.

MR. ALTMAN: One of the things that we have to look at, your Honor, is that if this has a denegrating effect

on religion, if it is not a good means for reinstilling the religious fear in our population, then I think it goes to the problem of our arguments, that it creates divisiveness.

We have many major religious groups in this state that will come in and give testimony that they were opposed to the adoption of this legislation for that very reason.

THE COURT: Would they be for it if it really advanced religion? Would that make the statute any more valid?

MR. ALTMAN: No. Well, I think their position is any time the government mandates and compels or imposes religion, that you denegrate religion. That's the next point we make.

I'm finished with that line of inquiry, other than to ask—

THE COURT: Then I asked the question too late.

(p. 47) I think your—you suggested to me that you're saying the legislature thought this would advance religion but it really doesn't. That seems to me if it really did, it would be even worse.

MR. ALTMAN: I think the legislature clearly intended this, and that's obviously the thrust of our case. They have said so as a religious act.

I think it bears recognition that if that were their purpose—and I recognize the purpose that on constitutional grounds would be improper, but I think the record should be complete and reflect the fact that it is an improper means in terms of increasing morality, even if the argument is made here—

THE COURT: You mean an ineffective means. Well, I don't know that that really is an issue in this case, that morality is improved or not.

MR. ALTMAN: Let me make—

THE COURT: Well, go ahead and ask your next question. I should have gotten to this earlier.

MR. ALTMAN: The argument from the defense is that this has some secular purpose as well.

THE COURT: You mean morality—

MR. ALTMAN: Right.

THE COURT: All right. Go ahead.

BY MR. ALTMAN:

(p. 48) Q Dr. Gilkey, you've heard the dialogue between Judge Debevoise and myself. I was going to ask you, what did you think of the statute, A Moment of Silence, in terms of a tool or a means of bringing back morality, so to speak, either in religious or secular sense to school children or to society?

THE COURT: I think you better break it up.

Q Take them one at a time.

THE COURT: You're now getting into the secular area, which goes beyond, perhaps, his area of expertise. I'll let you ask it anyway.

Are you going to morality generally, not tied with religion, but just morality?

Q Let's start with it in terms of religion.

A Well, one of the dominant elements of the American tradition in religion, not the only one, but one that finally became dominant, as we all know, was that the government, in fact, or the established order, in fact, the coercive power of the state, in fact, could not and should not enter the field of religion and in terms of encouraging it, which was the implication of the Judge's remarks, it seems to me.

And there were those who felt from the side of religion that any government's interference in religion, any imposition of particular religious formation or acts were, in fact, counterproductive to religion.

This tradition was in a kind of lonely way (p. 49) because most religious groups didn't, in fact, agree with it, was borne by, especially the Baptists and the Quakers, interestingly, because a good number of Baptists—I'm a Baptist—a good number of Baptists have forgotten their tradition, and wish to bring the state into their act.

But they were certainly convinced that religion could not be healthy if it was required. And that, in fact, a required spiritual act with the power of the state or, in this case, the school, saying you must do so and so, was a self-contradiction as a spiritual act.

They could require you to stand up, to sit down, and so forth and so on, but the inward activity essential to both religion and, I would think, morality are something you can't require. That is to say, if it is required, it doesn't exist. And if I do it because I have to, then it's not done.

And what is done, actually, is, it seems, what the result is counterproductive in the sense that it builds resistance on

the part of any healthy person. They tell me to do this, they tell me to—and so on, it builds resistance. It builds cynicism because the act is done hypocritically, and the history of, I think, of western religion, where this issue has been raised particularly, shows that where religion is voluntary, it tends to be active, creative, growing, as in the United States.

Where it is still required, it tends to be (p. 50) objective, external, on the whole, declining, let's put it that way.

I think the explanation for the relative vitality of religion in America, whether that's good or bad is another issue, and in some of the countries of Europe, is at least partly based upon this.

In this sense those who say religion is better if it's voluntary and the state says not, are historically correct it seems to me.

This point I would disagree with those who we have quoted in saying if we can bring prayer back into schools by requiring this moment of silence, that will develop a much healthier culture spiritually.

I think the facts show that doesn't happen.

MR. ALTMAN: Excuse me one moment. May I have a second, your Honor?

THE COURT: Yes.

(Pause.)

Q Do your last few remarks, the impact on religiosity, spirituality, of coercion, your argument that that would tend to negate or historically, you say, work against those—that effect, doesn't that work against—since the statute is

compulsory, at least as to the moment of silence—does that work against your argument that a moment of silence is likely to lead to objective prayer?

(p. 51) A Well, to me, my argument makes sense in the sense that I do think it will lead, in many cases—I'm not saying in all—in many cases to closing the eyes and bowing the head and, in fact, acts of what I have called objective prayer, perhaps led by the teacher. That seems to be a pretty good prognosis here.

And what I'm indicating is that that's the kind of required, objective behavior that tends to develop resistance, tends to develop a bit of cynicism about what religion is. To identify religion with this objective behavior, that doesn't mean anything and so on, and that one sees throughout the history of western life with regard to required spiritual and religious activities.

Going to church, for example. If you have to go to church, it doesn't mean anything to go to church and people object to it and so on.

I think, myself, that this is true of any spiritual activity of any importance, even if it isn't religious in the sense I'm speaking about, and I would include morality. One can't in that sense legislate morality.

I think from the side of religion, the creative thing about the First Amendment, that is to say that helps religion in that sense. It isn't a penalty to religion, that the state wasn't involved. It is a help to religion. This is what William Penn and Roger Williams, the Quakers and the (p. 52) Baptists, tried to say to the Lutherans and the

Catholics and the Episcopalians and so forth who didn't believe it.

Well, they do now, but it took a long time.

THE COURT: That was your last question?

MR. ALTMAN: One last question.

Q You earlier alluded to the devisiveness in the community. How does the fact that—you say the moment of silence will likely result in an objective prayer. How will that tend to create divisiveness in the community?

A Well, as I've indicated, in the first place, I agree with the proposition that any religious act that is required in the public schools is divisive in the sense that there are people in our society—I'm not one of them, but I'm sympathetic with them—who don't want to have anything to do with acts of religion.

I've also indicated that any form of spiritual act is particular, that is to say, it is this form rather than that form, and it excludes people who want to use that moment of silence in another way.

My own feeling is that where children don't know what this moment of silence is for, the law has not stated what it is for, hasn't given an educational content, so to speak, to it, hasn't structured it educationally. If that had been done, I would have had a different feeling about it. It is left there. It is left there for teachers and principals (p. 53) to fill in as they see fit, as far as I can see.

Now, the brunt of this law, having been passed, is that it is okay to use it in any way, and since it was identified in the public mind as a prayer law, very definitely, I don't think there is any question about that, it will seem,

and I think rightly, that the legislature of New Jersey has said it's okay to pray.

So that in any context—and, after all, a surprising, surprising number of Americans are religious and wish there to be prayer in the schools in many, many communities, this will, in fact, result in the kind of, what shall I say, general American objective prayer that I have described.

And, now, what's the problem with that? The problem with that—and I'm no expert on this, but I've read enough of these cases to know—the problem with that is that it puts students in the bind that's quite familiar in many cases either of going against their own personal convictions or that of their parents, or else suffering some kind of approprium from their peers.

That's the bind, I take it, many of the courts sought to avoid. That's precisely what will happen, I think.

As I've indicated, it is wrong to say people can freely use this for prayer if they wish. I've indicated that there are many, many groups for whom a moment of silence (p. 54) cannot be used for prayer. If they seek to use it for prayer, they will break the moment of silence.

MR. ALTMAN: Your Honor, we have no further questions for Dr. Gilkey at this time.

THE COURT: Why don't we take a ten-minute recess.

MR. ROBERTSON: That will be fine, Judge. During the recess, perhaps I can ask Dr. Gilkey to look at the copy of the Act.

THE COURT: Yes, during the recess. All right. A ten-minute recess. Dr. Gilkey, you can step down and read what Mr. Robertson gave to you.

THE WITNESS: Okay.

(Recess.)

THE COURT: Dr. Gilkey, would you come back?

THE WITNESS: Yes, sir.

LANGDON GILKEY, resumes.

THE COURT: Yes, Mr. Robertson, are you ready to proceed?

CROSS-EXAMINATION

BY MR. ROBERTSON:

Q Dr. Gilkey, before we adjourned I provided you with a copy of Public Law 1982, Chapter 205, the same Act that Mr. Altman has referred to as 1064.

A Yes, sir.

* * *

(p. 60) A No.

Q Now, Doctor, I've given you the Act.

A Yes.

Q Have you had a chance to review it?

A Um-hum.

Q Does the Act in any way—withdrawn.
Does the Act indicate that there is—withdrawn.

Is the word "meditation" used in the Act at all?

A Well, I think this came up before. The word "contemplation" is used. And as I've been using the word "meditation," I've used it as a synonym, perhaps with different tonalities, but not very significant ones as far as I'm concerned, to meditation. That is to say, I would take contemplation and meditation to have the same force.

Q Do you limit the definition of the word "contemplation" to meditation?

A Well, contemplation, it seems to me, if we are now talking about the nuances of difference, in my discipline they are use, roughly, synonymously.

Contemplation seems to bring forward the idea of an object more than meditation does, though not necessarily more. That is, contemplate, you can visually contemplate a vase, for example, or a flower. And it—otherwise I would say the two were used quite synonymously.

Certainly as I indicated, I hope clearly, both (p. 61) can be used in a religious and in a secular context.

Q Thank you, Doctor. That was my next question.

Do you acknowledge that there are secular meanings for the word "contemplation"?

A I do, and I did in my testimony, if I remember correctly.

Q With regard to the word "introspection," do you acknowledge that there are secular meanings to the word "introspection"?

A Oh, yes, absolutely.

Q Now, Doctor, I think you testified late in your direct testimony, that one of the problems with the Act

was that the state has not put forth any educational content. Would you please explain what you mean by that?

A I would expect that if something were to be a creative part of a curriculum, in the first place, that it would emanate from those who are involved in forming a curriculum, namely, the education department and teachers, principals, so forth, so on, and that it would be structured as an educational program, enterprise, device, whatever word we wish, and I can well conceive—and I don't mean to say I can't, I don't mean to deny this point—that a—the Department of Education of the State of New Jersey might, in whatever way it comes about in a decision like this, say we wish to introduce into the curricula of the state a program of (p. 62) meditation or contemplation or introspection and structure this as an educational program.

I have suggested that if they were going to do this, they would find themselves very limited if they had only a minute to do it. And I made that point rather forcefully and I am convinced of it.

But if they said we think for ten minutes a day this would be a very useful think educationally, I don't deny that's possible. I would think that if they were going to do that, they would give it a certain structure.

Now, by structure I mean they would say how you're going to use it, and perhaps most important, they would say how this would differ for kindergarten, for sixth grade, for high school, because it is inconceivable it would be the same.

As I say, I'm no expert, but I know enough to know that this—the use of such a thing would be different in kindergarten than it would be in senior high school.

That's what I mean by an educational program coming forth as an educational device, if that's the right word.

The history of this legislation gives to me no indication of such a generation, such origination, such a purpose, so forth and so on.

Q And that's the history referred to earlier with regard (p. 63) to newspaper articles?

A And the history of the legislation, that is to say, I can't sight you chapter and verse, though I've been over it several times. There is a history of similar laws which have increasingly lost their prayer character, let's say.

Q Evolved, as it were?

A Evolved implies improvement. I don't know. They have changed. They have changed.

Q They have changed from what—

A Incidentally, the same thing happened with the creationist laws. They got less and less specific about the religious content as, so to speak, they were thrown back further and further on the football field. They got less specific.

Now, that's my interpretation of this history.

Q Do I take from that statement that the present Act that is sitting before you is less specific about its religious content?

A Yes, quite evidently so. And my point is, of course, that doesn't mean it doesn't have a religious purpose, intent, so forth, so on.

Q Now, Doctor, I will attempt to summarize my understanding of some of your points. Please feel free to correct me.

Do I understand you to say that it is your (p. 64) opinion that this Act, as written. will cause children to pray?

A Yeah. Do you understand me to say, and you want me to revise that to state what I intended to say, that this Act, when implemented, will cause—cause is all right, it sounds forcing, and I don't mean that—but the result will be, let's say, that is, the use of the word "cause," the result will be that great numbers of children and, I suspect, teachers, classes, will use that moment of silence mandated here—though the word "permit" is here, and I don't quite know what that word means, but that's another point—that will use that mandated moment of silence for prayer, for bowing the head. closing the eyes and to all visible intents and purposes, praying. That is certainly my expectation.

Q Intentionally use the word "cause." Is it your testimony that this moment of silence will not necessarily cause prayer?

A Well, it all depends on what you mean by "cause." I'm perfectly happy to discuss this word with you. You seem to be making a good deal about the word.

Q Dr. Gilkey, let me ask you another question.

A All right.

Q Will this force children to pray?

A No, no. It will not in any direct sense force them to pray. I wouldn't use the word "force." It will force

them (p. 65) into a situation in which it may well be, and I would expect it would be uncomfortable for a number of them, if they don't pray.

And that, I take it, is the substance of a good number of these cases with regard to the establishment of religion; that there is a situation, no one is ever forced to pray. People are forced to be silent, close their eyes, I suppose, bow their head.

I've indicated you can't force any subjective activity of that sort. However, you can force or mandate a situation in which people are made uncomfortable if they do not.

Q If they do not engage in this subjective activity?

A Engage in—well, engage in closing their eyes, bowing their heads, assuming an attitude of prayer. Let's put it that way.

Q Assuming outward manifestation?

A Right.

Q And talking about subjective activity, prayer as you've defined it?

A No, I said there is objective prayer.

Q Focus on subjective.

A Well, you can't force that at all. I've made that point.

Q Would this Act result in forcing subjective prayer?

(p. 66) A No Act can force subjective prayer. But objective prayer is still objective prayer and people object to that. I know many groups, for example, Islamic groups,

who would regard it as blasphemous to be involved in objective prayer of a different sort than their own.

Q Doctor, does the Act mandate children should close their eyes, fold their hands, bow their heads?

A No. It doesn't mandate anything. It says "permit." And I would like to hear you say what that means.

Q Doctor, in all due respect—

THE COURT: No, Mr. Robertson.

This is your turn.

THE WITNESS: That's right, that's out of order. I withdraw it.

Q Thank you.

A Right.

Q Does the Act—so that we are clear in your answer—mandate direct command, closing eyes, folding hands, bowing the head?

A No. It mandates, as I understand the word "mandate," as you're using it, it mandates a moment of silence.

Q Does it compel any of those activities?

A No.

Q Does it compel objective prayer?

A The Act does not. I'm indicating that my view of the (p. 67) consequences of the Act is that that's what it will be used for.

Q Doctor, believe me, I will give you the opportunity to get to the consequences. I wanted to focus on the Act.

A Right.

Q Does the Act mandate—

A Not on the surface, on the face, as the lawyers say.

Q On the face of the language, none of those acts, subjective or objective, are mandated?

A That's correct. That's correct. The face of the Act does not.

Q Would it be fair to say what the face of the Act—nothing is compelled on the face of the Act except silence?

A Well, the duration is compelled. I take it a moment is compelled.

Q 60 seconds of silence?

A Right.

Q Doctor, does the Act direct that teachers partake of the moment of silence?

A I suppose it tells them they can't talk.

Q Would you read the Act, sir, again, please?

A Well, one interesting thing about the Act is you don't have silence if anybody talks. Now, if you can conceive of a moment in which the teacher is talking, and you have a moment of silence, you're better than I am.

(p. 68) I think a teacher has to be silent here or get out of the room.

Q Would you read the Act out loud, Doctor?

MR. ALTMAN: Your Honor, the Act speaks for itself.

THE COURT: Mr. Robertson wants to make inquiry about it. So, would you read out loud?

A Sure. "Principals and teachers in each public elementary and secondary school of each school district in this state shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student before the opening exercise of each school day for quiet and private contemplation or introspection."

Q Does the Act direct that a teacher participate as a participant in the moment of silence?

A It seems to me to do so or else get out of the room. And I've indicated why I say that. But I don't think that he or she can talk.

Is this part of the cross-examination?

THE COURT: Someone doesn't like you, Doctor.

Q If this were a Quaker meeting, Doctor, I would have my own idea.

THE COURT: You will have second thoughts about visiting New Jersey again.

THE WITNESS: I must have said s[illegible]thing wrong.

(p. 69) Q Doctor, silence, quote, unquote, is silence religion?

A Not necessarily, no, obviously.

Q You, therefore, admit that silence has secular connotations?

A Yes. I think I've said that.

Q You are not an educational expert?

A Correct.

Q Do you know whether silence has any use in the educational enterprise?

A I don't know it. I can well imagine that it does or could have. And I've specified, I think, that point.

Q Doctor, you have testified that there are certain—I think your term was "novel religions," and that's not by me meant to be perjorative?

A New is a better word.

Q Emerging religious identifications or associations in our society.

A Right.

Q Could you specify those and give us some quantification of what they are?

A Well, the Unification Church is the best known. That is, as far as I know, not a traditional religion, though any religion is made up of traditional components, so to speak. That is the Moonies I'm referring to.

There are a number of others.

(p. 70) Q By gesturing, I really want you to take both parts of my question. Specify what it is, and give us a quantification of its presence in our society, and American society.

THE COURT: Quantification, the number of adherents?

MR. ROBERTSON: Judge, if he knows. That's an acceptable answer too. If he does not have a—

A I really would hesitate to say, how many, for example, the Unification Church has. And I certainly don't know how many in New Jersey.

Q All right.

A There is a sizable number of young people involved in that movement.

That's Unification Church. Next?

A Well, there are a number of them. When I use the word "new," I meant new to the American scene.

Now, if you add to that various forms of Hinduism, various forms of Buddhism, especially Zen, the Sik groups, which have Ashrams in many centers in New Jersey. There are monasteries in Southern New Jersey of Tibeten Buddhism that I have visited.

These are new in the sense that they weren't there 50 years ago. The religion is certainly not new in the sense that it has been on the globe for a long, long time.

Q We were speaking in the context of emerging in our (p. 71) culture and our society?

A That's right.

Q Are there any others, Doctor?

A Oh, many, many others. Sufism—Sufism, is a form of Islam. The Black Muslims are also new, not quite that recent. I mentioned Synanon, that's largely California. There was the Jones situation that we knew about. There is the Gurkhaic group.

Q Excuse me, Doctor, could you amplify on that?

A Well, now, I mean, my own expertise here will run out after ten more minutes, let's say, of reciting these names. I will be glad to do it if you want to hear them.

Q I do, Doctor.

A Well, the Gurkhaic group, the Synanon.

Q What type of religion is Synanon?

A Well, that's a combination of psychology and religion. It began as a psychology and ended up as a way of life encompassing almost every aspect of one's behavior, and, therefore, fits in pretty much with my definition of religion.

Now, from here on I'm going to start talking about different formation of Hinduism and different forms of Buddhism; the Hari Krishna, for example; the various meditation sects; the Zen groups; the Ahmadi Buddhist groups.

THE COURT: I think he has exhausted his present recollection, so let's move on to another question.

(p. 72) Q I think you've testified, Doctor, that this—these particular religions will not be able to use the moment of silence for prayer.

Could you tell us, using some of them as examples—you have given some on direct—why or what prayer form they adopt that would prevent them from using the moment of silence?

A Well, Hindu groups and Buddhist groups would use the moment of silence as a spiritual act for meditation, and meditation for those groups would involve the seated posture, a seated posture.

Q You better stop here at that point, Doctor.

A It would involve—

Q Let me interrupt and ask a question.

Is there anything in the Act that would prevent someone from being seated during the moment of silence?

A No, nothing.

Q Okay.

A The point is, though, that a child who was told by its parents to be seated and cross-legged would not be unnoticed by all the other students, and you would, therefore, have created precisely the divisive situation that the courts have sought to—that's exactly what I was talking about. That a person either had to submit to other convictions of a religious sort or submit to whatever kind of ostracism or (p. 73) scorn or laughing or whatever by being substantially different.

This is, I think, a principle well recognized in the courts.

No, it doesn't mandate you can't sit. It does mandate you can't say anything. And there are forms of prayer, some of which I've mentioned, which do involve speaking.

Q Such as?

A Well, Islamic prayer.

Q What type of speaking is required for Islamic prayer?

A Calling on Allah.

Q Is there a particular posture that must be—

A Yes, you better. You have a prayer rug and you get down on the floor and you put your head on the floor. You prostrate yourself.

Q Doctor, are you generally familiar with the every day activities in elementary and high schools in this country?

A Yes.

Q Is there an opportunity for someone who is Islamic to engage in such activities?

A Yes, there must be, if they are Islamic. They have to be.

Q Is it normally provided in the schools in this country?

A Yes, opportunities for prayer are provided in the (p. 74) schools. This is very clear in our brief, that there needs to be no law for that.

Q Your brief, Doctor?

A I mean the brief that was put forward, that there are already opportunities for silence, prayer, this, that and the other, if a student wished to do that.

Q Could you tell us where you are personally familiar with those opportunities being accorded, where someone who is Islamic is provided an opportunity on the school grounds to get down on his rug and to engage in his prayer?

A I'm not familiar with how that's handled in the public schools, no.

Q You have, therefore, no personal knowledge that that, in fact, is the fact?

A Is provided, no.

Q Would that be true with regard to particular forms of prayer engaged in by the other groups that you have talked about?

A You mean would it be true that I don't know about it?

Q Yes, sir, that's my question.

A I don't know how opportunity for them to pray the way they want to pray is provided, and, in fact, I don't —Islam is the one that is required to do this.

Q In fact, you don't know if it's provided at all?

A Insofar as a person is able to absent themselves from (p. 75) their peers and in the normal life of school most forms of prayer are available to a student during the day.

Q It is your testimony, however, that these students, of the groups that you have identified, will be frustrated by the moment of silence because it does not accommodate their particular forms of prayer?

A Insofar as the moment is used for others to bow their heads and close their eyes, and the others are suggested by their parents or by the teacher that this is an appropriate use of this moment, and there is no reason it shouldn't be, in terms of if the legislation is passed, as I've suggested, these others will not be able to pray in their fashion. That's what I'm suggesting.

Q Doctor, do you have any empirical data which indicates that that will in fact happen, that children will bow their heads, fold their hands and manifest some subjective prayer?

A I have seen a picture of a New Jersey school in which all the children are bowing their heads.

Q Doctor, are you aware—

A I suppose that's empirical.

Q Are you aware of any empirical data which would tell us, this Court, that the child was praying?

A This is empirical data, data that the child is undergoing, or enacting an attitude of prayer.

Q And where is that empirical data to be found?

(p. 76) A That they are bowing their heads, closing their eyes, so forth and so on.

Q Are there any studies that validate that opinion that you are aware of?

A No.

Q Behavioral studies?

A No.

Q Do you associate a bowed head, folded hands and closed eyes with closed eyes with prayer?

A Um-hum. Um-hum.

Q Are there any studies that validate that as being invariably the case?

A Didn't say when I associated with prayer that it was invariably the case.

However, I think it is obvious that this is, in the majority of cases, or in a great number of cases, if a particular act or attitude represents an act of, as I've said, objective prayer.

Q So that we understand your testimony, the testimony is that the Act in front of you, would you agree that it permits a student to assume that outward posture may create the impression in others not participating that the student is participating and in that way will be divisive?

A Well, I assume that the students talk to one another as well as observe one another, and that, I assume, also the (p. 77) American public being the way they are—which I have no quarrel with, in fact, I will permit—being interested in religion, religious, so forth and so on, that the use of that moment—and I think this is what was intended—the use of that moment will be to enact an attitude of prayer, to put it that way.

Q Create an atmosphere—

A And I assume that people say what did you do, and a lot of kids will say to others, I was assuming an attitude of prayer.

Now, for a second grader to use that phrasing is, of course, absurd. But that's, in fact, what they will be doing. They will know the other kids are doing it.

I would assume that a number of teachers would say —when the students say what are we supposed to do—say, bow your heads.

Q And that, Doctor, you believe will be destructive?

A Yes. I assume that it is generally agreed that any mandated or, well, mandated act of religion is regarded as destructive. That's my whole argument.

Q Doctor—

A But that's why various elements of religious activity have been declared not to be appropriate in the public school.

Q Doctor, would you tell us what Thursday, September 8, was?

(p. 78) A Pardon me.

Q Thursday, September 8, last week, what was it?

MR. ALTMAN: What do you mean? Your Honor—what do you mean, "What was it?"

MR. ROBERTSON: I'll clarify it.

Q Was there a particularly significant religious holiday last Thursday?

A Yes, a Jewish holiday.

Q What was that holiday?

A It's the Jewish new year.

Q Rosh Hashanah?

A Yes.

Q And were Jewish children, to your knowledge, permitted to leave the public school system and go to their place of worship?

A I assume so. I don't know that for a fact.

Q Doctor, assume that they were.

A Right.

Q At lease in the state of New Jersey.

A Right.

Q Is it your opinion that a non-Jewish child—asking a Jewish child about what he did or she did on Rosh Hashanah will be divisive?

A No.

MR. ALTMAN: Your Honor—

(p. 79) A No, no.

THE COURT: I'll overrule the objection.

Q Would you distinguish for us, please, that fact and what you're concerned about—this Act might do?

A Well, I think it one thing for a student to leave the school premises to go to a, what is a private, in this sense, institution, namely, a synagogue or a temple, just as it would be quite appropriate on Good Friday for a Catholic to go to church. That's one thing. That is what take to be the accommodation of the free exercise of religion that is recognized as characteristic of this country's public services.

That's a quite different thing from carrying on or allowing to be carried on a religious activity on the premises of the school as a part of the school program and mandated by the legislature.

I think that is an entirely different thing. I think the courts have recognized that's an entirely different thing.

Q Haven't we just agreed that the Acts does not mandate any particular activity?

A No. I've indicated that what I think the use of the Act will be, and I've also indicated what I think the intent of the Act will be.

Q And you've indicated, have you not, that there is no (p. 80) data or study that you are aware of that will validate your assumption of how the Act will be used?

A No, because it hasn't been done yet, as far as I can see.

Q That was my next question.

Are you aware of the Act, silence for a moment, to be used by students for whatever reason they wish?

A Whatever purpose?

Q Whatever purpose.

A Yes.

Q As resulting in outward, overt manifestations of prayer?

A Well, I take it that everybody assumes when I've talked about this, that I am giving, I suppose, one could say, expert testimony on what the probable use of this Act will be. Certainly isn't that I know what's happened because I don't think it's happened.

Q That's correct, Doctor. And you've been very candid about that.

My question was, are you aware of any studies or are you aware that the Act has, in fact, be used?

MR. ALTMAN: Question has been answered, your Honor.

MR. ROBERTSON: No, I don't think so.

THE COURT: Overruled. Go ahead.

(p. 81) A No, I'm not aware of any studies, no, no.

Q By the way, Doctor, are you aware of the practice of several of the children, our children, who are Jewish, wearing yurmulkes in class?

A I'm certainly aware of older children, let's say students at a higher level wearing them, of course.

Q Do you think that creates any divisiveness?

A I said no. I guess you didn't hear me.

Q I didn't hear you.

A No, sorry. Again, I think that that's a very different matter, totally voluntary matter. You're dealing here with something the whole school does as part of the school program.

Q And what does the whole school do according to the Act?

A The whole school stops for a moment at the beginning and has a moment of silence together.

MR. ROBERTSON: Judge, may I have one minute? I may be done.

THE COURT: Yes, sure.

(Pause.)

MR. ROBERTSON: Thank you very much, Doctor.

THE COURT: Any redirect?

MR. ALTMAN: No, sir.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

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(p. 83) THE WITNESS: Peter J. Kuriloff, K-u-r-i-l-o-f-f.

DIRECT EXAMINATION

BY MR. ALTMAN:

Q Dr. Kuriloff, what is your present position?

A I'm an Associate Professor of Education at the University of Pennsylvania.

Q And how long have you held that position?

A Since 1970 .

Q Would you describe very briefly your educational background, again starting with postgraduate studies?

A I received a doctorate in education at Harvard Graduate School of Education. My specialties were in counseling and school psychology. That involved both learning about psychology, and also learning about the field of education.

Q Now, you just mentioned or alluded to a particular area of concentration or study.

Since you began your teaching career, have you had a particular area of concentration?

A Yes. My research and teaching involved two major areas. The first, starting with my work on my dissertation involving social psychology of class rooms and how problems that have previously been defined, or are sometimes defined as adhering solely in the individual child can be construed as problems that occur in the context and transactions among people in the classroom.

(p. 84) The goal of that research was to show that teachers don't necessarily have to refer every kid out for special help, especially when there is very little special help, but can find ways to intervene to help children within the classroom.

And then on that—following from that, I did studies on—within the same framework on discipline in the classroom and discipline in the school and the experience people had in controlling and helping students behave.

I taught a great deal about something called deliberate psychological effect on education also following from that, which is a body of theory that emerged starting in the '50s about how you can engage students more fully in the curriculum.

Q Can you tell us where you made your studies into discipline—

A Do you want me to finish the second—

Q I thought you were finished.

A I studied disciplinary issues in the junior high school.

Q I'm sorry. Finish your answer. I didn't mean to interrupt.

A Okay. The second area of my expertise is on the legal reform of education. I've studied how courts and Congress have created laws with the intent of changing what goes on in (p. 85) schools, and with the idea of discovering how people comply, when they comply, when they don't comply, whether the legal—the legal models, the best models for educational decision making, specific con-

tracts, like special education and disciplinary cases under Goss v. Lopez. The courts require that you have to have a hearing if you suspend a child for more than three days.

Q Going back to the first major concentration I think you indicated was the study of discipline in the educational process.

A Right. I spent several—two to three years in the junior high school in Philadelphia studying what was going on in that school to help the students that cause trouble in the school.

Then later I spent four years working on a national project that looked at the consequences of requiring due process hearings, mini due process hearings, for suspension cases. That study, I examined schools in the Philadelphia area and my colleagues who were working in Pittsburgh, and we put that data together at that time currently being written for publication.

Q Can you define for us the context of public school education and psychology what is meant by small group process?

A Well, small—everyone works in a variety of small group context. Your family is a small group. Classroom is a (p. 86) small group. The processes or the dynamics that happen among people in those classrooms, or in those settings, like a family, that cause people to behave in certain ways.

I'm interested in both how people affect groups and how groups affect people. So I'm interested in peer pressure; I'm interested in how one can change negative norms in groups, where, for example, gangs, or some kind of be-

havior in fraternities that lead to negative behavior, and how you get groups to react in ways that are more socially constructive.

Q The principle involved in studying the small group process would be implicated in both your study of discipline in the schools as well as implicated and utilized in your studies with regard to due process, so to speak, for schools?

A Yes, although the format is somewhat different. The dynamics are what interest me in both those cases.

Q Would you explain what you mean there?

A Well, due process hearing, you have a proscribed format, but there is quite a bit of variation in it. The interesting thing is how on people are affected by the variation. Do they—do the students or teachers perceive themselves as being more or less fairly treated if you vary the format?

What happens among people covertly and subliminally, for example, the testimony in this courtroom (p. 87) versus what's going on in the more subtle, interactions that happen to be between people.

Those all have influences, and I'm interested in studying them in a classroom particularly.

Q You don't study them just for the sake of discipline or the sake of due process. They are studied in the context of their impact on a learning situation or the educational proceess?

A Yes. Currently I also have a project going on, one publication is now in press, the others are in progress, on how small group process affects learning in college classrooms.

Q I take it from your earlier answer, but I think it was a little bit vague, that you have done direct observation in the classroom, or have you done direct observation?

A Yes, I have.

Q Of students?

A Yes, I have. I spent substantial amount of times early in my career, in junior high classrooms, and I spent substantial amount of time in the last few years studying senior high school.

MR. ALTMAN: Your Honor, we also have a curriculum vitae for Dr. Kuriloff. It is Exhibit Number 72. That's among the documents that I submitted to the Court earlier.

(p. 88) MR. ROBERTSON: No objection, your Honor.

THE COURT: All right.

MR. ALTMAN: And I would submit that Dr. Kuriloff is qualified as an educator and psychologist.

THE COURT: Voir dire?

MR. ROBERTSON: I'm sorry.

THE COURT: Any voir dire on the expert?

MR. ALTMAN: As an educator and a psychologist in the educational context.

MR. ROBERTSON: Voir dire on education, if I might.

THE COURT: Yes, go ahead.

VOIR DIRE EXAMINATION

BY MR. ROBERTSON:

THE COURT: P-72 in evidence in the meantime. (Exhibit marked P-72 evidence.)

Q Doctor, other than what you have described, have you been engaged in any activity that is hands on teaching of secondary and elementary school children?

A Only very early in my career, but early in my career, yes.

Q Where was that?

A That was through the—Boston University, Sergeant School Campus. I was in college an instructor with elementary students.

(p. 89) Q What context?

A I don't understand what you mean in what context.

Q What type of a course?

A Well, students came regularly from the public schools for a week at the nature camp in Peterboro, New Hampshire. I was an instructor, a nature instructor. I spent my time working with those students.

Q My question is, have you had classroom experience as an elementary or high school teacher?

A No.

Q Have you had experience as a lecturer and an educator of those teachers?

A Yes.

Q In what disciplines?

A My discipline is psychology. I'm a professor of education.

Q All right. Have you taught or are you now teaching curriculum content, structure, teacher, principal administration or any other subject?

A Most definitely.

Q What?

A I taught from about 1971 to 1973 a course that specifically is designed for students who are going into administrative, secondary and elementary administrators. One of my students in now the superintendent of schools in (p. 90) Newark, Columbus Sally.

All of my classes, with the exception of very specific ones that are trained to do psychotherapy, are open to graduate students of education from any discipline. So I regularly have reading teachers, elementary education students and students who are studying to be teachers at any level in the public schools.

Q Would you classify yourself as an educator of teachers?

A Among other things. I'm an educator of teachers and an educator of psychologists.

Q Your teaching experience, hands-on teaching experience is limited to the summer camp program you described?

A Yes, with elementary students.

MR. ROBERTSON: Judge, I'm not going to quarrel over his qualification as an educator. He is a qualified,

highly documented educator. With the caveat, I do not agree that he is an educator whose experience may be particularly appropriate here. I will agree he is qualified as an educator expert.

THE COURT: All right, then we can proceed with your questioning.

BY MR. ALTMAN:

Q Doctor, are you familiar with the statute that is referred to as the Moment of Silence?

A I am.

(p. 91) Q And were you asked to review that statute?

A Yes, I was.

Q For what purpose?

A For the purpose of commenting on its psychological and educational implications in the classroom.

Q Did you reach any opinion as to the value of the moment of silence as an educational tool or instrument?

A Yes. I think that its value as an educational instrument is marginal and perhaps harmful at best. At best, marginal and at worst, harmful.

Q From a psychological standpoint, did you reach an opinion as to the impact of the moment of silence?

A Well, I think it has varying impact, depending on the age group that we are speaking of, ranging from the capacity to make younger students quite anxious to opening up older students to peer pressure.

I also think it is a potential disciplinary nightmare. That's through the vagueness of the statute which allows —permits students to have a moment of contemplation, a minute of contemplation at their sole discretion.

I think that that opens up quite a can of worms for controlling classrooms.

Q Now, if you can, for a moment, let's focus on the so-called educational component of the moment of silence or purpose.

(p. 92) Can you tell us why, or what basis you reach the conclusion that at best it has minimal value and at worse, the worse can cause, I think you said, some anxiety?

A Well, it can't have an educational value because it is an empty sack. There is no curriculum base for it. It has no stated objectives. It has no plans for reaching those objectives.

It has no directions for teachers on how to do that. There is a vast variety of literature on the use of silence for contemplation and meditation that can focus—that is developed in the last 20 years. It doesn't refer to any of that literature.

It essentially creates a situation in which students are exposed to a full minute of quiet, which is a very long time psychologically. If we were to sit here for a full minute together in silence, I think we would be able to experience how long that is.

For little children that can be quite anxiety provoking. Even for adults it can be quite anxiety provoking, depending what the authority of the situation is doing.

Furthermore, it invites—well, it depends on the age group we are talking about. It invites younger children to model or identify with the behavior of their teacher. To the extent that some teachers are religious and use this either consciously or subconsciously to engage in (p. 93) prayer, it invites younger children to experience the pressure of identification with their teacher. And for older children, it opens up several possibilities; the first, with junior high and high school students, it opens them to peer pressure, depending on what the majority or the key group in the classroom is doing with that silence. It can put pressure on other kids.

Q Let me go back and ask you some questions to try to flesh out remarks you made with regard to the educational component.

What do we mean by a curriculum component?

A Well, a curriculum is a coherent plan for conveying a body of information or for—and for engaging students with that body of information—

Q Now is it your testimony—

A —for their learning.

Q And that's what's lacking in the moment of silence as an educational tool?

A Yes, completely lacking.

Q Now, cansilence, meditation and contemplation in the school room have educational value?

A Absolutely.

Q And what would you have to do to give it educational value?

A Well, you have to develop—there is a whole body of (p. 94) literature on teacher management that shows that effective classrooms, especially classrooms that where not only students learn best, but also are best behaved, are run by teachers who have very clear, pre-thought out plans about engaging students in activities, about moving the activities along, about having rules, simple rules that are clear and acceptable and understood by students, and that the teacher follows up and is consistent and fair about initiating those.

A curriculum involves the plan that you do, that you have to teach them, to teach them subjects.

Q Do you think a meaningful curriculum can be developed in a 60 second moment of silence?

A It be developed in a minute.

Q It cannot?

A It cannot.

Q What about meditation? Do you think that meditation has a—might have a beneficial place in the school room?

A Yes.

Q Meditation in the secular sense?

A Well, meditation, the origins of meditation are all nonsecular. But meditation in this century, especially in the last two decades, has a secular sense and can be very useful.

There is scientific evidence that shows that it helps reduce stress. It reduces people's blood pressure. It helps people relieve their tension.

(p. 95) It has a very strong physiological component, but you need 20 minutes at a time to do meditation.

Q And contemplation, do you distinguish that from meditation in this context, that is, in the school room?

A Well, they tend to be very related terms. Contemplation tends to be, I think, more general and vague. And contemplation, there is a place for contemplation.

Again, if contemplation is without purpose and direction, it is dangerous in terms of good manners in a classroom.

If is it directed and used for curriculum purposes, like the contemplation of a play, the contemplation of the motivation of a character, the contemplation of a piece of music, and that that's focused and students have a structure that they use to conduct their contemplation, it can be very valuable.

There is curriculum that have been developed that use that.

Q But in the absence of giving direction to the children, I take it that your opinion is that contemplation can have no real educational value?

A It has no educational value. It can be harmful.

Q Let's go to that.

You indicated earlier that the effect of the moment of silence would vary according to the age group in the(p. 96) public school. Can you take the younger children? You alluded to anxiety before. Explain to us what you mean by that and how does that come about by the implementation of a moment of silence?

A Well, a minute of silence is a very difficult thing for kindergarten students or first grade students or third grade students to manage. I don't think its possible to manage.

A Well, a minute of silence is a very difficult thing for kindergarten students or first grade students or third grade students to manage. I don't think its possible to manage.

As a matter of fact, the only study that I know about this was the Thompson study that was presented in Duffy versus LaCruz.

That study makes it very clear that students—that the younger group could not manage a minute, and teachers forgo, forewent, didn't use the whole minute.

Q For the record, that study you're referring to is the study that was done by Dr. Thompson who has been identified to you as an expert witness for the defense?

A Yes. You sent me that study with his testimony in deposition.

I examined that study, and it shows—he discusses quite clearly the younger children have a difficult time with it.

He doesn't distinguish in that study age groups. He says specifically the younger children couldn't manage it and the teachers have abandoned the full minute.

In the gross findings he doesn't distinguish age (p. 97) groups. But what he shows is a significant number of children, 26 percent, did not like it, and the terms they used connote anxiety.

Q For example?

A For example, they talk about not liking it, feeling uncomfortable with it. It drives me crazy. They use terms like that.

These are within the document that was submitted in that case and that I have.

Q I take it that anxiety is not conducive to the learning process?

A No. What happens when children get anxious, just like when adults get anxious, they start acting, misbehaving, start acting out.

Q What is your opinion as to, say, a junior high age student? What opinion do you have with regard to the effect of the moment of silence on them?

A Let me say something that's general for all three groups and then I'll come to that.

I think that for all three groups it does another thing. When students come—and this is supposed to happen before school. I don't quite understand what that means in terms of—the law says before school. I don't know whether that means they stand around and—before they come into the classroom or they come into the classroom. It's vague on that (p. 98) point in my understanding. But I presume that it means as they start school. And what happens is to the nonstructured moment of silence, allows all three age groups to continue their private thoughts so they come in from the playground with all kinds of private agendas, all kinds of private activities, and this allows them to continue.

It doesn't have the effect of focusing them and getting them going.

Elementary students, and junior high children especially, what you want to do is engage them immediately in activity. That's collective and focused.

Q Just in that regard, traditionally there are what's known as opening exercises in the public school. Do they have a value in the educational process?

A Yes, I think they do. Aside from—these are usually Pledge of Allegiance, salute, a patriotic song, a regular song, school song.

Q School announcements?

A School announcements.

What those do, contrasted to an unstructured moment of silence, is they focus students on a collective activity that's related to the educational product.

They help students shift from their private inner world to the collective, direct purposeful world of the school.

(p. 99) So, I would distinguish them and say this is a much more appropriate enterprise—activity.

Q Shifting slightly to—I guess it's mixed—we talk in terms of the psychological affect and the educational affect. Is it correct to say it is hard to distinguish between them at times?

A One bears directly on the other.

Q It's—

A It's hard to learn when you're anxious.

Q It has been suggested that the moment of silence might be an appropriate vehicle for bringing calm and or-

der to the classroom at the beginning of the day. I think you made some allusion to that. Could you expand?

A I think it is a misused vehicle for doing that. First of all, it is not at all clear that the common order is what—is—in that sense is what is the first order of business? The first order of business is getting the students engaged in some kind of collective enterprise that involves learning. The moment of silence delays that.

Second of all, as a strategy, silence is one of many the teachers use to control students. And the control of students is required in a variety of times during the day and in a variety of context.

To the extent that this mandates a rigid use of one strategy, the opening of the day, it tends to dull what (p. 100) might otherwise be a sharp instrument.

Q Meaning by the sharp instrument you're referring to the tool of silence?

A Right. For example, a teacher will turn off the lights in an elementary class as a signal that the students have gotten out of hand and everyone has to be quiet.

This tends to routinize that and remove her or his judgment about when silence is an appropriate vehicle. It interferes with the discretion of the teacher. That, I think, is always a mistake.

Q So I take it that the silence, if it is not structured at a particular—routinized at a particular time, but left to be utilized by the teacher in a given situation, might be an effective educational or disciplinary device?

A Yes.

Q We talked about calming. That is same argument —I think it's the same argument that has been posed in terms of a transitional period.

Would you view that the same, and if so, I assume your answer is the same, if you would see a transitional period from nonschool to school as being something different than bringing order and calm? And would you relate to us whether you think it would be effective for that purpose?

A As a transitional device?

Q Yes.

(p. 101) A I think teachers have a variety of transitional devices, and this would be quite a poor choice.

As I said before, the literature on effective discipline and effective classrooms shows that the best transition is when students come in and they know what they are supposed to do and they begin engaging in that activity immediately.

This is a pause without content at the beginning of the day, whose purposes are unclear. All of that violates those principles.

Q Incidentally, are there times, do you have an opinion—can you tell us whether there are times during the course of the day when the need for a claming device or a transitional device are more important that at the beginning of the classroom day?

A Yes. It depends very much on the age of the children, but it is very clear that disciplinary problems occur in transitions after school begins; for example, from lunch back to school, between classroom, as students go

from one classroom to another, later in the week, later in the semester, and in front of every vacation and after every vacation. So that transitions become more difficult and almost predictable ways.

Usually young students come in eager to go to work and ready to go to work. So the elementary level, that (p. 102) transition, I think, is inappropriate. I think you can put them to work. I think that I'm in accord with a great body of research literature.

Junior high students have enormous amount of private agendas going on that preoccupy them greatly, and teachers have to spend quite a bit of time getting them engaged in school. A lot of it has to do with how they relate to their peers and how they are doing socially.

The moment of silence opens the classroom for a continuation of that.

Q You indicated earlier that you had studied what you called group processes or small group processes, the psychodynamics of the interaction of children in the classroom.

Can you tell us whether you have an opinion—and I think you did allude to impressionability of school age children—but can you tell us what the dynamics generally are between, say—let's take first the elementary level child—between one another in terms of whether you have an opinion that if one or two children are praying or more are praying what effect that might have on other children in the classroom?

A Well, for the very young children, the issue is how the teachers behave primarily. The teacher tends to be a

surrogate mother. The vast majority of elementary teachers (p. 103) are women, and for young children, it is the first significant outside the family that they work with, usually.

To that extent the two—the young students openness to influence by those early teachers is enormous.

To the extent that there are a percentage of teachers who use that overtly to pray, there is a strong chance the students will be influenced to do so likewise.

There is some evidence—it varies very strongly regionally—but there is strong evidence that a small to a large proportion, depending on what part of the country you're talking about, teachers do pray.

Q And is there evidence that in those areas where the teachers do pray that the children follow and and pray themselves?

A There is no—I know of no research study that says that. What I do know is that there is strong evidence that teachers are very—that students, young students are very responsive to teachers and model them.

So I think I would be comfortable as an expert saying the likelihood of that is very strong.

Q When you say prayer, or pray, are you saying that teachers would be praying out loud or would the same conclusion—would you reach the same conclusions if the teacher merely took an attitude, or a prayerful attitude by, for example, bowing his or her head, closing their eyes, (p. 104) clasping their hands?

A People communicate in a variety of ways besides orally. And to the extent it is an oral prayer, students are

likely to be directly influenced. In the sense that teachers strike an attitude, the young student is likely to mirror.

I think that—well, I know, at least the survey data are quite clear, that even long after the prayer and the Bible decisions of the Supreme Court, a substantial number of teachers continued to pray, depending on the region. It is official policy in some places, or unofficial official policy.

Q Can we move from the elementary level to the junior high school level? Would you comment on the dynamics in that classroom—

A Yes.

Q —with respect to the prayer or moment of silence?

A Yes. There the issue shifts from the teacher to what the peers do. Junior high school students especially, probably much more than even senior high students, are very succeptible to what their peers are doing and what the significant peer group is doing, the clique that has the most prestige or power.

To the extent that you are in a region which that group is predominated by students who believe in prayer and use that time for prayer, the other students are going to feel, if not influenced to pray, at least coerced or (p. 105) threatened, put in an awkward position; caught between wanting to be part of the crowd and their own convictions.

MR. ALTMAN: May I have just one moment, your Honor?

THE COURT: Yes.

(Pause.)

MR. ALTMAN: I have nothing further.

MR. ROBERTSON: Judge, may we take our lunch break at this time and come back a few minutes early? But before we do, I would ask Dr. Kuriloff the same questions I asked the other witness; if there is any material in the courtroom that he has of the 612 nature, perhaps he can give it to me during lunch and we can save some time.

THE WITNESS: I only brought some of it. I have all the testimony in the New Mexico case. I didn't bring it, but I have the brief.

THE COURT: Why don't you get together and exchange documents.

We'll recess at this time and resume at a quarter of two.

MR. ROBERTSON: Thank you, Judge.

THE COURT: Good.

(Luncheon recess.)

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(p. 118) DIRECT EXAMINATION, FURTHER

BY MR. ALTMAN:

Q Doctor, earlier in your testimony you stated that you thought that the implementation, the Moment of Silence would create a disciplinary nightmare, quote, unquote.

Can you tell us what you meant by that?

A Yes.

May I have a copy of the law, please?

(Exhibit handed to the witness by Mr. Robertson.)

A Thank you.

If you read this Act very closely, it becomes very clear that it is ambiguous. Taking it on its face, it says it allows students in public schools to participate in one minute of silence before the opening of the school day.

It is not clear that students have to do that. It allows them to.

Second of all, once you read through, on line 2 it says, "This state shall permit students to observe one minute of silence to be used solely at the discretion of the individual student."

It dawned on me as I was thinking about this that in schools where there are problems with substantial number of students who engage in misconduct, especially junior high where you have always a number of school house lawyers among students, that a student who wanted to misuse this, it is an (p. 119) open invitation to misuse it.

For example, what happens when a student decides he wants to stand on his head in the silent moment of prayer? What happens when somebody decides they don't want to be silent?

After reading this, it is certainly arguable that if I don't want to be silent, I can talk or write or do something else.

So then you have a situation where the teacher is in a position of enforcing a very unclear regulation or rule. I think that puts a teacher in an administrative straight jacket.

You have room for people who want to be silent, and a room for people who don't want to be silent.

So I can foresee in some schools, some classrooms, this could be misused badly.

Q I take it then it leaves to the discretion of the teacher how the moment of silence is going to be conducted, and, therefore, you would have this wider range of uses of the moment of silence as you have various opinions among teachers?

A. Yes. And teachers will respond to specific students in specific context and specific communities.

The demands made on him or her in those context will vary widely from class to class, I might say, where you have tracking—one track that contains disruptive students.

(p. 120) Q How would the diversity of communities impact—the diversity of communities, regions, et cetera, impact on the use of the moment of silence as an opportunity for prayer?

A Well, it's very clear from the literature that compliance with the ban on prayer and the Bible varies greatly from region to region, across states and within states.

In those regions where there is a substantial amount of population who supported prayer in defiance of the Supreme Court rulings, the pressure among, especially junior high schools and high school students to pray, would be very serious, especially if that group were predominant and viewed as the lead or the special group in town.

MR ALTMAN: I have nothing further.

THE COURT: All right Cross-examine.

CROSS-EXAMINATION

BY MR. ROBERTSON:

Q Doctor, the last question that Mr. Altman just asked you, what literature are you referring to?

A There were several surveys that were conducted after the Supreme Court rulings, in the years following the Supreme Court rulings. I can give you specific citation.

Q Would you, please?

A Yes. There is a nice summary of the surveys in a book called The School Prayer Decisions: From Court Policy To Local Practice, by Dolbeare.

(p. 121) Q Just a little slower. School Prayer Decisions?

A Colon, From Court Policy To Local Practice, by Kenneth D-o-l-b-e-a-r-e, and Hammond, H-a-m-m-o-n-d, P.E., University of Chicago Press, 1971.

The exact sites are 29 and 33. They review the survey literature on compliance with the original prayer and Bible reading.

Q Anything in the last ten years?

A I'm looking through my dates here.

Q Yes, please, take your time.

A I think that's the latest thing that looked exactly at that particular question that I know of.

Q Is there any studies that you're aware of that would validate that data down to 1982?

A No. The only study—the interest in those laws, in those court decisions, of course, peaked in the late '60s. So by the early '70s people weren't studying that any more that I know of. I've done a literature research review of that and that's the latest I could find.

Q You anticipated my question.

A Yes.

Q You've done the literature review to determine whether there has been any further examination of this phenomenon?

A Yes. I was not able to turn anything up past those dates.

(p. 122) There are gallup surveys and things like that that show that 81 percent of the people support prayer in the schools, for example. But that's not exactly the same thing.

Q That's correct. We are focusing on those errant teachers and students who are praying despite the Supreme Court.

A Right.

Q Is there anything that validates the data for New Jersey in 1982?

A No.

Q In the study that you referred to that's dated in 1971, I assume that's the publication. To what period of time did that material relate?

A Those compared—that particular—well, there is a set of surveys that are cited in that book. The surveys, the most interesting ones compare '62 with '64 and '5. In other words pre-decision and post-decision.

Q Is there any material in that summary that you have reviewed pertaining to New Jersey?

A No. It is national. It goes by—New Jersey is included. So, yes, but not specifically New Jersey. It goes by region.

Q Is there any data in there which indicates what the situation was in New Jersey?

A Only in terms of belonging to the eastern region.

(p. 123) Q What about the eastern region?

A The Eastern Region, pre-1962, 83 percent of the teachers reported conducting prayer or—prayer, this is the prayer date. There is also a Bible date. 83 percent reported conducting some kind of prayer ceremony prior to '62. After '62, 11 percent.

Q How did that compare to the other regions of the country?

A Well, it is quite interesting. In the West, prior to the decision, there were 14 percent and it's dropped to five percent. So in the West they weren't doing much praying compared to the East.

In the Midwest, it was 38 percent and it dropped to 21 percent. And in the South it was 87 percent and it dropped to 64 percent.

Now, what I know about religious practice and the relationship to region and section and community is that

that will vary within the state. So that in some places in the state there will be a high percentage and in other parts of the state there will be a very low percentage.

Q What was included in the Eastern Region? You indicated New Jersey was. Can you give us the other—

A I'm sorry, I can't tell you exactly which. I assume it is the Eastern Seaboard States and New England.

Q And that data stops in about 1964?

(p. 124) A '64 or '5 school year.

Q Now, Doctor, the Act in question, Intervenor-Defendants Exhibit Number 9. In describing that Act just a few minutes ago you used the word "allow." Does the Act use that word?

A Yes.

Q And where is that?

A "An Act to allow students."

Q The title of the Act?

A I assume that's part of the Act.

Q What does the substantive portion of the Act state?

A Hopefully the title has relevance to what follows.

The Act itself says, "Principals and teachers in each public elementary and secondary school of each school district in this state shall permit students to observe a one minue period of silence to be used solely at the discretion of the individual student before the opening of exercises of

each school day to be used for private contemplation or introspection."

Q Do you interpret the words "shall permit" as mandatory or discretionary?

A Well, I interpret it as discretionary.

Q Does the Act require that teachers participate?

A No, it doesn't. It's not clear who it requires.

Q Doctor, you were present and you've heard Denice Fishburne testify about her reaction to taking the oath.

(p. 125) Do you think her reaction was an appropriate reaction for a child of her age?

A That she took it seriously?

Q Yes.

A Yes. It is one of several reactions that one might expect.

Q Doctor, before the luncheon recess I asked you to produce material that had been provided to you by counsel. Can you hand—produce that material?

A Well, what I brought with me. I can't produce the pile.

Q That's correct.

A Yes. I removed this from the the pile. This I removed from the deposition of Thompson. You have my private notes on it.

I have the brief and a piece of the deposition of Dr. Thompson in New Mexico, and I think the law.

MR. ROBERTSON: Judge, may we just take a second?

THE COURT: Yes, sure.

(Pause.)

* * *

(p. 128) A Well, let me distinguish between technical validity and face validity, all right?

Q Please, Doctor.

A The study as a whole leaves much to be desired. It has serious flaws that I can't judge because it doesn't tell me enough to be able to judge it.

What I rely on is the report of the kinds of things that 26 percent—his summary of the kinds of things that 26 percent of the students would not like the moment of silence reported.

There are problems with that because that's his summary. We don't know what else they might have said.

So I couldn't say that this is a reliable, consistent report of what the universal things those students said to him.

Assuming that it is, it describes a state of anxiety. And he summarized it. He did the study.

Q And as to the other reports and summaries of students who liked the moment of silence, would you accept those as being his summaries, subject to the same caveat?

A Yes, absolutely.

Q Do you know of any other study done by a clinical psychologist such as Dr. Thompson as to the reactions to the moment of silence?

(p. 129) A No.

Q Did Dr. Thompson find that it was used for prayer?

A He reports that two percent of the students used it for prayer. Now, what we can't tell is what age those students were.

One of the things he doesn't do that throws this study into question is he doesn't, what we call, block the study.

In other words, one thing you have to do when you're doing a survey or any kind of research is you want to make sure that you sample the population, the groups within the population that you care about.

For instance, we don't know if he—he did a random sample, but any random sample could miss junior high kids altogether. It shouldn't, but it could, it could miss the religious ends of town.

We don't know that. We don't know if he blocked for ethnic background. He seems not to. He did a straight random sample.

So I'm uncomfortable with interpreting the findings fully.

Q Did you read Dr. Thompson's deposition?

A Yes.

Q Was that issue explored?

A The question of the sampling was explored, but not the (p. 130) question of its inadequacy.

Q What is the term used in random sampling that you are describing?

A Blocking? Blocking is an attempt to avoid making key mistakes in polling or sampling.

For example, in the election of '48, as I understand it—I think I've got the right election—they used a phone survey and they excluded all the people who had the phones—who didn't have phones. So they left out a key poor element of the population. You don't want to do that.

In this case we want to make sure the sampling accounted for any Jews in town, any Protestants in town, made sure that it got—made sure that it reached a key religious group and any section that was very upper middle class and tended to be liberal.

Q Now, also provided to you was a copy of the Act, copy of plaintiff's brief with Mr. Cantor of counsel, and a two-page typewritten document entitled, "Professor Adam Strupski, testimonial outline."

A And I received that a few minutes before I testified.

Q Have you incorporated Professor Strupski's proposed testimony in your testimony on direct?

A Did I?

Q Yes, sir.

A Well, I had read it just before I came in. I don't (p. 131) know if I—I don't know if I incorporated it.

Q Then I will not ask you a question about it.

Doctor, I would like you to describe in detail the Court your comments with regard to junior high school students, and I think the word you used was they have an enormous agenda. I think this was in the context of your describing what you considered to be negative aspects of the moment of silence, is that correct?

A Potentially, yes.

Q Could you explain to Judge Debevoise what you mean by junior high school students having an enormous agenda?

A Well, junior high students are preoccupied with a variety of social concerns. They are starting to just be independent of their parents. They are very much concerned with how they look in the eyes of their peers. They are very much concerned with awakening sexuality. They are very much concerned with their status among their peers, their popularity, those kinds of things. Those things tend to preoccupy them quite a bit.

Q Is it your opinion that this moment of silence, as to those students that you have described, will only exaggerate the concentration on that agenda as opposed to concentration on the seriousness of school?

A Well, it will tend to allow students to think about what they are thinking about. If the main clique in the (p. 132) school is concerned with its power over territory,

they will think about that. If the main clique in the school is concerned about religion, they will think about that.

So it depends very much on what they are thinking about. In a situation where you have a strong Christian club in a strong Christian community, prayer might be one of the things that they use that for.

Q How would you, as a clinical psychologist, determine accurately, scientifically what they are thinking about?

A You can ask them.

Q Such as Dr. Thompson did in his study?

MR. ALTMAN: I object to Dr. Thompson's study because we are indirectly trying to introduce a study that is not in evidence, and which the witness has not said that he relied upon in reaching his opinions.

All he cited from there was one statistic.

THE COURT: That's all right. He said even if he didn't mention it, it would be a legitimate question. I'll overrule the objection.

MR. ROBERTSON: Obviously mine is based on the fact that he didn't read it. I'm not asking him to validate it. I just asked such as.

THE COURT: Yes. We are just getting into the agenda. That's an illustration of what it might be.

Q Subject to the questions that you had before, I'm just (p. 133). saying that a clinical psychologist—

A Or a counseling psychologist in my case.

Q —or a counseling psychologist in your case would conduct a study.

A Yes.

Q Okay. Have you—

A Let me add that I would do some things differently, though. I would make sure I knew who was responding to me and that I could identify them.

The problem in that case is I can't tell you what Thompson says about junior high kids because he doesn't distinguish them from elementary kids or high school kids. That's a serious flaw.

Q Doctor, just define how you would go about it very quickly, brief. Just how would you go about it?

A I would determine the questions first. The major problem with this study is that it is not clear what he's trying to find out. If he's trying to find out how many students are using that for prayer, he hasn't gone about it right because the questions don't bear centrally on that issue.

He only asked one question about what they are doing in the moment of silence. The rest of it is about all kinds of other things. I would be much more specific about what I wanted to know and then I would make sure that I (p. 138) include the knowledge of the discipline of sociology?

A It never hurts, but what I would—where I answer this question from is knowledge of school, knowledge of transactions in schools, knowledge of curriculum and knowledge of psychology. That, I think, makes me able to answer these questions without having the data in terms of knowledgeable prediction about the likely consequence.

Q And what is your prediction about the likely consequences of the moment of silence?

A I think that for younger children in elementary school, especially in the first three grades, it's likely to cause substantial amount of anxiety, unless the teacher comes in and structures it, and then the question would be how she—it is likely to be a she—structures it.

To the extent she uses it for religious purposes, I think that the consequence would be to induce students to follow her practice.

At the junior high level, I think that the consequences are much more likely to invite disruption on the part of students and to require a students, a teacher, to intervene in ways that I find interesting to imagine.

At the senior high level and at the junior high level, both, I think the consequences are to invite the stronger groups in the—among the students to influence the weaker students in directions that they wish, whether that be (p. 139) religion, construction or constructive use. That would depend on the regional setting.

Q Do you have any data from both groups upon which you can give us some idea in the younger age groups how many teachers were used for religious purposes, and in the older age groups how many dominant religious groups there are—

A Can I do it one at a time?

Q That's fine, but I'll give you both. I was going to say, free and roaming in the state of New Jersey.

A Free and roaming.

Q I was being facetious, Doctor.

A The first part of the question is how many teachers are likely to use it. And I have only data from—I don't

have data from New Jersey. There are two studies. One is in Oklahoma and one—that I have been able to find, and one is in Michigan.

In Michigan two percent of the teachers actually conducted prayers, and that percentage changed dramatically depending on whether it was rural teachers or urban teachers. Rural teachers tended to use more prayer and the urban teachers less.

The other study that bears on this is in Oklahoma. And in Oklahoma—and this is—these studies are both '70 and '71. I can give you the exact cite afterwards.

In Oklahoma they surveyed principals. Well over (p. 140) 50 percent of the principals believed that the Supreme Court was wrong, and that schools should have prayer, should sponsor prayer activities and Bible. And 30 percent of the elementary teachers and 40—principals, and 40 percent of the secondary principals said that, in fact, that was going on in their schools after the decision.

Would you like the exact cites?

Q I would, Doctor, but I'll get them afterwards, unless the Judge wants them at this point.

THE COURT: What's that?

MR. ROBERTSON: The exact cites for the data.

THE COURT: I don't need them, no.

Q And the date of that material?

A Those are both around '70, '71. I can give you that.

Q Okay. There is no data available for New Jersey?

A Not that I know of.

Q So based on your discipline as a consultant psychologist, could you give us a quantification on how many teachers in New Jersey will use this moment of silence for prayer?

A Well, I have no idea, no way of knowing. My guess would be that there would be over five percent.

Q That's a guess?

A That's a guess. I couldn't tell you exactly.

Q Thank you.

(p. 141) A I would say a small but important amount.

Q Based on your experience as a consulting psychologist, if teachers were told that they shouldn't do that with this moment of silence, do you think that they would comply?

A Well, that's a regional question. We know that they don't comply when they don't agree to some extent.

The dynamics have that, which have been spelled out in a lovely book called The Dynamics of Compliance: What Affects the Leadership in the School and the Leadership in the Community."

If it is leadership in the community and the schools support the group or decides to go along with the rule, then the teachers will go along, too. They will comply.

In those areas where the local leadership does not support it, they don't comply.

Q You talked about older children, dominant groups. What type of data would you need in order to make a

reasonable, professional prediction as to who would dominate or what would dominate?

A Well, you need to know—you can make some general—I can say generally what the classification—what the categories would be. Students who are from upper class or upper middle class economic background tend to be more influential. Students who are successful in school tend to be more influential. Students who are good looking tend to be (p. 142) more influential. Students who have some strong skill, athletic ability, tend to be influential. That varies from community to community.

All schools have these sets, all schools. They can be divided up. You hear them talk about the research, you hear them talk about it in terms of the—I don't know, there are a whole set of new terms. The students would be able to tell you very fast. Any student in junior high school can tell you what they are very quickly. You wouldn't have to go very far.

You have to explore who belonged to tell what the characteristics were that dominate.

Q To summarize your answer—and if you disagree, please state so—there would have to be some clinical investigation to determine what the dominant theme was of these groups.

A There would have to be an empirical investigation.

Q Empirical. And has there been such in the state of New Jersey?

A Well, that's a very broad question. I'm sure there are studies about schools.

Q Let me ask you this question: Are you aware of any?

A No.

Q Doctor, you have testified that in your professional opinion, the moment of silence will have minimal value at best and it will be harmful at worse.

(p. 143) A Bad education and bad religion.

Q I think I've heard that phrase before. What is the minimal value that you can foresee for the moment of silence?

A I think I used the word "marginal."

Q Marginal value?

A And I make that distinction because I didn't mean that there was some low level value that was there. I meant that if there were a value, it was very far to the edge of what one would consider important.

Q And what is it?

A Well, under the best of circumstances it might allow —I have to think about it for a minute. It is not so easy to find a good value for it.

Under the best of circumstances I think that it might allow some people to center, to focus in on their own concerns so that they can get ready. You understand the best of circumstances.

Q Would you explain that a little bit more so I understand it? You understand the best of circumstances it might allow—

A Allow some students to think through what was on their mind a little bit more before they started school.

Q What value would that have for students?

A Well, you're asking me to testify on the other side of this.

(p. 144) It might have some value. It's possible if it had value. I wouldn't advocate that it would have value.

I think it could have value if it were structured better and teachers explained the purpose of it and it had a curriculum. Then it could be very valuable.

Q What type of curriculum would you recommend?

A Well, you need to remember that the—my view of the problem with the minute of silence is that it is essentially unstructured, an open sack.

For contemplation and meditation to be useful in the classroom, first of all, you have to help students understand how the thing—how to deal with all the ruminations going on in their head. People come in and they are abuzz. That happens to us, too.

There are techniques for helping them work through that and become more focused on the present and more focused on the curricular objects. The curricular object might be relaxation.

There is substantial studies that show that meditation, which started as a religious practice, can have significant effect on tension reduction and lowering of blood pressure and things like that if it is done—it takes a lot of work. You have to practice. It takes 20 minutes twice a day, and it takes somebody who knows how to do it to teach you how to do it. So it can just do that.

(p. 145) But it does have a curricular impact. For example, in the Philadelphia public schools, out of there effect of education project, have used centering, what they call centering, but it's really helping students relax and focus and observe or contemplate a specific thing, like Julius Caeser's speech, or like a description of a battle. Or I actually read one in the Philadelphia public schools.

It enables a student to imagine what is there and what isn't there in the story.

For example, what did Isaac feel if he was going up the mountain with his father? That comes right out of a piece of their curriculum that I found last spring. Or how did Julius—how did Marc Antony feel when he's making this speech?

You can do it, help students think through more complex ideas. In that sense it can be very good. But you have to have an idea what you're going to do, the purpose of it, the substance of it, to what end you're working, and you have to let the students understand that and you have to let them give you feedback about their experience of it.

Students can be self-reflective. It is important to allow them to interact with you about it.

Q And they can be this without really getting involved in any kind of religious activity?

A Well, certainly. They can do all kinds of things (p. 146) without being involved in religious activities.

Q Is it fair to say your opinion or the criticism is the Act standing alone without the framework of a curriculum you don't think would be useful?

A And might be detrimental, right.

Q Because it routinizes the use of quiet, just quiet, and depreciates its use by the teacher at other times during—

A As a disciplinary instrument, it removes the discretion of the teacher, and once the instrument—but it is also negative because for younger kids it can make them anxious, and I think there is evidence of that.

Silence is a very powerful social experience. If you think about the words that silence is connected with, we have unearthly silences, deathly silences, awesome silences, religious silences.

And if you have a silence—what are people's association with silence? We have a moment of silence and somebody dies. And in the context of that powerful experience, it opens people to both inner influence and external influence.

That's why I don't like it, because it isn't controlled by the teacher or the educational authority.

Q And, indeed, may be used, based on your experience, just really influenced into the classroom, and talking about the junior high school students, a whole bunch of trivialities (p. 147) that they may have on their minds that don't relate to the educational experience?

A It could do that, or it would influence into the experience of a prayer, if that's what was on the mind of the key group in that school.

Q Doctor, do you believe that it is necessary to establish a boundary between school and nonschool?

A Yes.

Q And how has that been done traditionally?

A Well, traditionally, through opening exercises of one sort or another.

What I like about those is that they have a public content, and that they involve direct, collective activity that focuses students from their private experience to a public, appropriate educational forum.

Q And gives them a sense of community with each other.

A Absolutely.

Q A collective undertaking?

A Yes.

Q Could the moment of silence serve that role?

A Well, I don't think it serves it at all well. The reason for that is because—because it's contentless, it tends to further whatever mental activities a student has when he or she comes into the classroom.

And as a consequence, it tends to keep students (p. 148) in their own fantasies, their own thoughts, their own concerns and not—it doesn't demark the transition.

That's also a poor ritual in my opinion.

MR. ROBERTSON: Thank you, Doctor. No further questions.

THE COURT: Any redirect?

MR. ALTMAN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. ALTMAN:

Q Dr. Kuriloff, Mr. Robertson questioned you about studies as to the impact of the Supreme Court ban on prayer or other religious activity in the school and what the study showed with regard to compliance after. I think you responded with regard to a study that was done in the '64, '65 period.

A Right. The surveys were done then.

Q And then you were asked if you could predict or quantify the number of students that you thought might—

A Teachers.

Q —teachers, that might pray as a result of the—strike that.

* * *

(p. 150) Q In essence, I asked you if the public perception of the Moment of Silence is an effort to reintroduce prayers in the schools, do you think that perception will result in teachers being more likely to pray?

A Absolutely. I think the evidence is indisputable that people derive support for their beliefs when it goes with their beliefs from a legitimate body like the legislature. I think it would increase it.

Q When Mr. Robertson was asking you about what you would ideally like to see in a study in order to determine how many people are going to pray as the result of a moment of silence, do you think that you're going to get a reliable result for, say, New Jersey, if you select Las Cruces, New Mexico as your town to conduct the survey in?

A I don't think that—if you distinguish between reliable and valid, I doubt that it would be generalizable to New Jersey, from what I know about New Mexico.

My guess is it is a highly Catholic population in Las Cruces. I'm not positive. My guess is that you have a high Hispanic, high Catholic population. I think that would be very different than the variety you find in New Jersey.

Q The fact is that how it's going to be utilized will depend upon what the major beliefs are of the people in the (p. 151) area utilizing this?

A Yes. That's why it's very important to make sure you get representative groups, all the key groups included in the studies.

Q We have areas in the state that are more—can be said as to be more religious, more fundamental than other areas, correct?

A Right.

Q And, therefore, we might find a variation in the utilization of moment of silence from one area of New Jersey to the other?

A To the extent that's true, I'm sure it would be true. To the extent it's true, there are differences which I think

is safe. It would be major differences in compliance and use.

MR. ROBERTSON: Judge, I don't want my silence to be taken as an indication of agreement with what has just gone on here. I'm not aware of any evidence in this case that would validate Mr. Altman's assumption in the question that there are areas in the state where there are certain identifiable groups.

THE COURT: I think it was on the hypothetical basis, if there were.

MR. ROBERTSON: Shall we couch it that way so I'm not deemed—

THE COURT: I'm understanding it that way.

* * *

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In The

Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

JOINT APPENDIX

Volume II, pages 227 to 412

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INDEX TO JOINT APPENDIX

Page

Chronological List of Relevant Docket Entries in the United States Court of Appeals for the Third Circuit . 1

United States District Court for the District of New Jersey Docket Entry Sheet 2

Complaint, Affidavit of Brenda Butler; Affidavit of Cary Butler; Affidavit of Mark Tulloss; Affidavit of Jean Ross; Affidavit of Dr. Reverend George Younger; Affidavit of Reverend Dudley E. Sarfaty; Affidavit of Jeffrey May; Affidavit of Rita Rothenberg; Affidavit of Gary Drew 13

Order to Show Cause, Dated January 10, 1983 47

Order Granting Temporary Restraint, Dated January 14, 1983 50

Order Permitting Intervention, Dated January 18, 1983 53

Answer of Intervenors-Defendants' Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly; The New Jersey General Assembly; Carmen A. Orechio in his representative capacity as President of the New Jersey Senate; and The New Jersey Senate, Dated February 18, 1983 55

Notice of Motion by Intervenors-Defendants, Dated February 22, 1983 58

Notice of Motion and Affidavit of Anne McHugh, Esq., Dated April 18, 1983 60

Transcript of Proceedings on Motion, Dated April 20, 1983 89

Excerpts from testimony of Langdon Gilkey, witness on behalf of plaintiffs

Direct Examination, pgs. 20-54 129

Cross Examination, pgs. 60-81 160

INDEX TO JOINT APPENDIX—Continued

Page

Excerpts from testimony of Peter J. Kuriloff, witness on behalf of plaintiff
Direct Examination, pgs. 83-105; 118-120 181
Cross Examination, pgs. 120-148 204
Re-direct Examination, pgs. 148-151 224

Excerpts from testimony of Paul D. Houston, witness on behalf of plaintiffs
Direct Examination, pgs. 170-186 227
Cross Examination, pgs. 186-197; 199-206 242
Re-direct Examination, pgs. 206-211 256

Excerpts from testimony of Joseph Nathan Chuman, witness on behalf of plaintiffs
Direct Examination, pgs. 212-221 261

Excerpts from testimony of Marianne E. Rhodes, witness on behalf of plaintiffs
Direct Examination, pgs. 225-227; 229-230 272
Cross Examination, pgs. 234-235; 237-239 276
Re-direct Examination, pgs. 239-241 280

Excerpts from testimony of Lloyd J. Newbaker, witness on behalf of plaintiffs
Direct Examination, pgs. 246-257 284
Cross Examination, pgs. 257-263 294
Re-direct Examination, pgs. 263-264 300

Excerpts from testimony of Stanley L. Rosner, witness on behalf of plaintiffs
Direct Examination, pgs. 264; 268-275 301
Cross Examination, pgs. 276-278 309

INDEX TO JOINT APPENDIX—Continued

Page

Excerpts from testimony of Thomas C. Thompson, witness on behalf of intervenors-defendants
Direct Examination, pgs. 356-357; 363-364 313

Cross Examination, pgs. 395; 404; 407; 426; 430; 445-446; 453; 458-460 316

Excerpts from testimony of Evelyn A. Swenson, witness on behalf of intervenors-defendants
Direct Examination, pgs. 467; 469-470; 473-475 ... 327

Excerpts from testimony of John B. Singer, witness on behalf of intervenors-defendants
Direct Examination, pgs. 498-499 333

Cross Examination, pgs. 505-521 335

Excerpts from testimony of Adam Scrupski, witness on behalf of intervenors-defendants
Direct Examination, pgs. 532-535; 542 352

Cross Examination, pgs. 543-545; 561 357

Excerpts from testimony of Jerome Aumente, witness on behalf of intervenors-defendants
Direct Examination, pgs. 603-604; 613-616 361

Excerpts from testimony of Dudley E. Sarfaty, witness on behalf of plaintiffs
Direct Examination, pgs. 647-654 367

Excerpts from testimony of James Connerton, witness on behalf of plaintiffs
Direct Examination, pgs. 656-659; 661-662 375

Plaintiffs' Exhibit 55, Governor Thomas H. Kean, Letter to the General Assembly 381

Plaintiffs' Exhibit 56, New Jersey Senate Roll Call 384

Plaintiffs' Exhibit 57, New Jersey Assembly Roll Call 386

Plaintiffs' Exhibit 58, New Jersey Senate Roll Call 389

Plaintiffs' Exhibit 59, New Jersey Assembly Roll Call 391

INDEX TO JOINT APPENDIX—Continued

Page

Plaintiffs' Exhibit 63, Governor Cahill Veto of Assembly Bill No. 597, 3/8/71 394

Plaintiffs' Exhibit 64, Governor Byrne's Veto of Assembly Bill No. 648 (OCR), 3/3/78 397

Plaintiffs' Exhibit 65, Governor Byrne's Veto of Assembly Bill No. 2197 (OCR), 5/4/81 399

Plaintiffs' Exhibit 67, The New Jersey Council of Churches Release 400

Plaintiffs' Exhibit 69, New Jersey School Boards Association Position Statement, 12/13/82 403

Plaintiffs' Exhibit 77, Memorandum by Marianne Rhodes on Assembly Education Committee Meeting, Monday, May 17, 1982 405

Notice of Appeal, Filed February 14, 1984 410

Order of the Supreme Court of the United States dated January 27, 1987 postponing further consideration of the question of jurisdiction to the hearing of the case on the merits 412

The following opinions, judgment, orders and other relevant documents have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement or to the Motion To Dismiss Or Affirm filed in this matter:

APPENDIX JURISDICTIONAL STATEMENT:

A. Opinion of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126) 1a

B. Opinion of the United States District Court for the District of New Jersey 62a

INDEX TO JOINT APPENDIX—Continued

Page

C. Order of the United States District Court for the District of New Jersey 101a

D. Judgment of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126) 103a

E. Notice of Appeal to the Supreme Court of the United States and Proof of Service 106a

F. Assembly Bill No. 1064 ..... 110a

APPENDIX TO MOTION TO DISMISS OR AFFIRM:

A. Letter of appellants' counsel dated May 6, 1986 to Clerk of the Supreme Court of the United States 1a

B. Letter of Chuck Hardwick, Speaker of the New Jersey General Assembly, dated April 21, 1986..... 4a

C. Letter of Leon Sokol on behalf of John Russo, President of the New Jersey Senate, dated April 29, 1986 ..... 5a

D. Letter of Alan J. Karcher, Minority Leader of the New Jersey General Assembly, dated April 29, 1986 ..... 6a

E. Letter of Chuck Harwick, Speaker of the New Jersey Assembly, dated May 2, 1986 ..... 8a

F. Statement dated April 28, 1986 by Senate President John F. Russo and Assembly Speaker Chuck Hardwick concerning the Moment of Silence Case 10a

G. Transcript of hearing before the Honorable Dickinson R. Debevoise, U.S.D.J., for the District of New Jersey, dated January 18, 1986 ..... 11a

(p. 170) A I was the assistant superintendent of the program in Birmingham, Alabama.

Q And what are your duties as a superintendent of the school system in Princeton?

A I'm a chief executive officer for the school district. I work under the direction of the Board of Education, supervising the overall operation of the district, both the business aspects of the district and the problematic aspects of the district.

Q I take it under your jurisdiction as chief executive officer would be public school grades K through 12?

A That's correct.

Q And can you give us approximation of the exact number, if you know, the number of schools or students that are within your public school system?

A This year we have four schools; two elementary schools, which are K to 4, one middle school which is grades 5 through 8, and one high school, grades 9 through 12.

Q Do you know what the student population is?

A It's between 24 and 2500 this year.

Q Are you familiar with the religious or ethnic composition of your student body?

A In a general way.

Q Can you tell us what that is?

(p. 171) A That's primarily—in terms of religious —primarily Catholic and Protestant, but we do have a

fairly sizable Jewish population; sizable meaning 15 to 20 percent, and we have students from over 40 countries represented in the school system.

So, we have the other major religions in the world represented in the student body.

Q Can you tell us how many different languages may be represented by the families?

A Between 40 and 45 on an average yearly.

Q Would you describe for the Courts very briefly your educational background?

MR. ALTMAN: Your Honor, we don't have a curriculum vitae.

THE COURT: All right.

A I received a Bachelor in Arts degree from Ohio State University. I received a Master of Arts in teaching from the University of North Carolina and a certificate of advanced study and administration and doctorate of advanced education, Harvard University.

Q Dr. Houston, can you tell me when, if ever, you became or first became familiar with what has been referred to as the Moment of Silence statute?

A I became familiar with it in news reports as the legislature was debating the Bill and the Governor's veto, and (p. 172) overriding of the bill, and then, more directly, after the Bill was finally passed, by, again, news reports of it, hotline that came through the school system from the Commissioner of Education's office.

Q That would be Mr. Cooperman's office?

A I believe it was Dr. Ruh, R-u-h, sent it.

Q And taking you back to when you first began to read in the media about this moment of silence, can you tell us what your impression was as to what was being adopted?

A I had the impression that it was essentially a way of putting prayer into the school setting in a way that would perhaps get around the original Supreme Court rulings.

Q And did you, before the adoption of the statute, take any kind of action or partake in any discussions or do anything in response to learning that such legislation was in the process of moving through the legislature?

A Not really.

Q When the statute was adopted, did you then have occasion to have to respond in some way, either by talking with the board or taking some administrative action?

A Had several things. My first knowledge of it, the Governor's veto having been overridden, came by way of irate phone calls from members of the public in my community who were concerned about our implementation of the law. We really didn't even know the law had been put into place, so we had (p. 173) not even implemented it yet.

I had three or four phone calls the first morning before nine o'clock from parents who wanted to make clear that they do not want their children in a classroom when this law was implemented. They wanted to be told when we were prepared to implement the law so that they could enforce that with their children.

There were further converastions with the media and whatever about the situation. And then, as I recall, this took place the latter part of the week, and the next Tuesday evening I had occasion to discuss it with my Board of Education.

Q Let's go back to the first morning.

You received phone calls from parents objecting to their children taking part in this moment of silence?

A That's right.

Q Were you aware that the statute, as it had been adopted, did not use the word "prayer"?

A Yes.

Q And that it did not use the word "religion"?

A Yes.

Q That it used a word such as "contemplation," "introspection," "moment of silence"?

A Yes.

Q Did you still, upon learning that, view this as an (p. 174) effort to reintroduce prayer in the school?

A Oh, absolutely.

Q Can you tell me why that was?

A Nationally, there were a number of states going through the same process of trying to introduce legislation. In some cases it involved a so-called nondenominational prayer that the legislature would pass. In other cases it involved a moment of silence. But in my mind, as an educator, the only reason for such an action had to involve the

notion of prayer with religion because there were no educational purposes served by the law.

Q When you were in Alabama, did you have any experience with any similiar type of legislation, or did you have an opportunity—

A That had been ongoing in Alabama for some years, the efforts to overturn the Supreme Court rulings and come up with a state remedy which would get around it. I'm very familiar with that, and keeping up with it, about the same time New Jersey was going through this, Alabama had passed a state prayer written by the Governor's son and we were in the courts over that particular piece of legislation.

Q When the parents called you on the first morning that the law had become effective, how did you respond to the parents?

A I responded by first telling them that we weren't (p. 175) entirely sure what was involved with the law because we had not seen it in writing, that we were sensitive to their concerns, and would not implement the law without a clear—some clear sense of direction, without letting them know what we were going to do.

Q So although—were you aware that the law had, by its terms, been mandated to become effective on that Monday?

A Found out a little later after this conversation.

Q But you did not implement the law prior to meeting with your board the following Tuesday?

A That's correct.

Q Did any teachers or other administrators or other students ask you why the statute hadn't been implemented?

A No. The only response that I had from staff tended to be concern about whether we were going to make them implement it because there was a general opposition to implementing it.

I had calls that first morning, again by nine o'clock, from both principal of middle school and principal of the high school, who were very concerned that we were going to implement the law immediately because they felt it was going to be extremely disruptive to their building operations.

Q Was it explained or did you understand in what way they feared disruption?

A Yes. They felt that most of the students would not comply with the law, that they may have problems with the (p. 176) teachers complying with the law. A number of teachers were opposed to it. They weren't entirely sure how you implemented a moment of silence.

Getting high school students to remain silent when they were told to be silent is not always the easiest task.

If someone objected, how do you let them object? What would you do? How do you punish a student?

All sorts of questions arose. There was just general concern about the situation.

Q How did you meet these concerns in terms of guidelines for implementation? Did you direct anybody to draw guidelines? Did you consider guidelines?

A No. I felt that—normally, when the law was passed by the legislature, we get fairly clear direction from the State Department of Education on how that law is to be implemented.

In this case, because of—there was—seemed to be general confusion at the state level as to what the law meant with at least a portion of the state, Attorney General, the Governor, about expressing their reservations about its legality.

The State Department only sent the law out in the wording that had been passed so that there was no clear implementation.

(p. 177) We were also concerned that because of the general tenor of the situation, and also because Princeton is the kind of town that it is, that we would very quickly become defendants in a suit defending a law that most of us disagreed with anyway.

We felt the best thing to do was not implement it until it was absolutely clear that it had to be implemented, and it was very clear on how it was to be implemented. In fact, we did not implement it at all at any time.

Q What do you mean by Princeton being the type of town that it was? Are you talking about—

A It's a town of very broadly held opinions and very deeply felt opinion. It is a town which does involve a very broad cross section of ethnic and religious background.

It is a town that you have to be very careful that you're not offending people fairly deeply about their beliefs.

We felt that given the number of attorneys we had available in the town, the kind of opinions that were available in the town, that we would very quickly become defendants in a case, that it became very clear that none of us supported to begin with.

Q Did you think that—did you consider that it might be effective, that you could negate some of the opposition by simply explaining that all the statute called for was a moment (p. 178) of silence?

A Well, in fact, we did talk about that. But that really didn't negate it, because, again, the general impression was that it was still an attempt to impose religious action on schools.

Call it what you want, but if it walks like a duck and has feathers and quacks, it is still a duck.

So that it really didn't negate the opposition at all.

Q And would you say that that opposition—that perception of the moment of silence was shared by both teachers, administrators and students alike?

A Yes, and parents.

Q You indicated you met with your board the Tuesday after the effective date of the Moment of Silence law, is that correct?

A That's right.

Q And by "board", you're talking about the Board of Education for Princeton?

A That's correct.

Q And how many people does that consist of?

A There are nine members.

Q Are they representative of the cross-section of the community, do you know?

A To a large extent they are. They are elected by the (p. 179) public at large. There is no requirement that they reflect a diversity of the community, but to a large extent they do.

Q Was the Moment of Silence law a principal subject on the agenda of that meeting?

A We have a lot of principal subjects on the agenda. It was a topic that we spent 20 or 25 minutes discussing.

Q And what was the object of having this discussion before the board that day?

A Since I was supposed to implement the law, I thought it was appropriate for them to know that. I really reviewed for their benefit, as well as the public and press that were available, what our position was at that point in time.

In the course of doing that, it really started out as a formal item for me to the board. The board got into discussion about their feelings about it.

And, so, it ended up being a clarification for me about where the board was coming from as well.

Q You said this was an open public meeting?

A Yes.

Q Were there diverse views expressed by board members?

A Not terribly diverse. They were generally very uniform in their feelings about the law, which was that they were very close to it.

Q What instructions, if any, did the board give you with regard to when—how you should implement or not implement?

(p. 180) A Since the board was not to implement it, there was no vote taken. The sense of the board was that it was not to be implemented until it became clear that we had to.

At that time the board felt they wanted to rediscuss the issue. They were in a—they felt there was a major conflict situation. They have been sworn as part of the oath of office as board members to uphold the laws of the state of New Jersey.

I had a couple of attorneys on the board at that time who felt very strongly that the state law was not constitutional, and they had very strong feelings that they were in a conflict situation of what law should be upheld.

So they had a legal kind of bind that they felt they were in. And there was a personal bind of being the examples to students about being law abiding, and yet, perhaps having to uphold a law which they felt on its face was wrong.

Q Why did they think the law was wrong in this case?

A Well, again, there was a general shared opinion—

MR. ROBERTSON: Excuse me, Doctor.

Judge, I've sat here quietly. I think that we are getting into a lot of hearsay from people who are clearly available.

THE COURT: No, not at all. Overruled.

Q Dr. Houston, the Court has ruled that you can answer the question.

(p. 181) A Could you repeat it?

Q Okay. Would you tell us what reasons were expressed by the board members for their personal opposition to the law? You said you thought it might be unconstitutional. But specifically, what did they say?

A They felt it was an imposition of religious overtones in the school program; that it was, in fact, designed as a moment of prayer for students. While it was an individual choice as to what that prayer might be, that it was a mixing of church and state and that was their main concern.

Q After the board meeting, what action did you take as a result of the meeting?

A Well, I continued to take no action, in essence.

Q Was the Moment of Silence law ever implemented in Princeton?

A Not from my level. There may have been individual teachers, but I' mnot aware of any who may have implemented it. I probably would have heard about it had it taken place, but I did not get any indication that it did.

Q Were you aware of a student petition opposing the implementation of this moment of silence being circulated?

A Yes, the high school principal informed me of that petition.

Q Did you ever see it?

A Never did see it, no.

(p. 182) Q Did you continue—after the first day, did you have contact from students or administrators?

A Yes. I continued to get questions of concern about what we might do and a sense of opposition to anything that we would do if implemented.

At no time did anyone say to me that they wanted to see us implement the law.

Q So you didn't receive any complaints from parents who were in favor of it?

A None whatsoever.

Q You said it had no educational value. Can you expand on that more?

A Well, teachers have adequate opportunity now if they feel students need to contemplate issues that are being taught in the classroom. It doesn't require mandated moment wherever one does it simultaneously. It is very difficult to see any direct educational benefit to that kind of opportunity. It is only a minute, but it takes away from class time.

We are in a period of time now where we can read the press accounts of national reports, concerned about lengthening the school day, school year, because we do not have enough time on task for student learning. And yet this would be something that would clearly take away more

than a minute of instruction because we—had we implemented it, we would have had to design opportunities for students to leave (p. 183) the classroom and then return and what have you, which would eat up more than a minute of time. It would take away from instructional purposes that we already had, and it didn't reflect at all on any instructional purposes available to us.

Q Was there anything about the composition or the type of students that you have in your system that made you feel you would have increased or substantial administrative problems in attempting to administer or implement the law?

A Well, we have exceedingly bright students in the system, and students who are unafraid to express their opinions about any subject.

We had one last spring that took on the President of the United States on his nuclear policy and on national news.

So, with a student body like that you can expect that, you're going to have a great deal of major debate and a great deal of either overt or covert opposition to actions which they feel are not in their interest or against their moral or religious codes or their own ethics.

Q You indicated there was a widespread perception that this was an effort to implement religion or prayer in the school.

Do you have any—can you tell us what the feeling of the student body was about such an effort?

A Again, it was negative. They felt it was an imposition (p. 184) of their own personal choice, and that it was an area that the school had no business getting into.

Q That was communicated to you by students?

A Yes.

Q Teachers feel the same way?

A Yes. The ones who spoke to me indicated along the same lines.

MR. ALTMAN: Excuse me one moment, your Honor. (Pause.)

Q I think you indicated if students objected, you felt that you would have to allow them to leave the classroom if the law were implemented, or did you not say that?

A Yes. that was my feeling, that we would—our local design of implementation would have to allow the option of not participating.

Q To the extent of actually leaving the classroom?

A That was an indication of what was going to happen, whether we allowed it or not. So discretion being the better part of valor, we probably would have designed a situation so that that would happen.

Q Can you tell me why you viewed it being necessary, or why it would follow that students would leave in order to opt out of this program?

A I think that staying in the room, if they were not going to remain silent, would have obviously been disruptive (p. 185) to the people who were remaining silent.

It would have been an imposition of an action which I would not have been able to defend in any way with any arguments that I could muster.

Therefore, the simplest way of dealing with a potential disruption would have been to let them exit from the situation.

THE COURT: You could have done the reverse; those that want to observe silence could have done it someplace apart from the others.

THE WITNESS: They have that opportunity throughout the school day.

THE COURT: In an effort to comply with the statute which, as I recall it, provides for a moment of silence at the beginning or before the school day. Was that a feasible option?

THE WITNESS: We talked about the option since the way the statute was worded, if the school day begins at 8:30, that we would make 8:29 the moment of silence, and then students would have that opportunity since they are in the classroom. So we talked about that as a model.

THE COURT: One place where they could go to observe silence?

THE WITNESS: That would have been difficult with a student population of 1100, like we have in the high school, (p. 186) really finding a place that we may designate silent areas of something. We really didn't think it through that far.

THE COURT: Excuse me while I'm interrupting you. Is this Princeton Township and not Princeton Borough?

THE WITNESS: It is both. The schools are comprised of both municipalities.

MR. ALTMAN: Your Honor, I have no further questions.

THE COURT: All right, Mr. Robertson.

MR. ROBERTSON: Thank you, Judge.

CROSS-EXAMINATION

BY MR. ROBERTSON:

Q Dr. Houston, I will show you an unmarked copy, but this is Intervenor-Defendants Exhibit Number 9, I believe.

Is that the law that you have been referring to on direct examination?

A Yes. I have not seen it in this form, but I've seen the wording which came through on our hot line.

Q I would like to show you what will be marked as Intervenor Exhibit Number 10, and I'll describe it. It is a message from Gus Ruh, Deputy Commissioner of Education, dated December 17, 1982. I ask you to look at that.

A Yes.

Q Is that the form in which you first saw it?

A Yes.

(p. 187) Q The language is not—

A It looks like the same thing, yes.

Q Doctor, does the language of that law require anyone to pray?

A Not in the way it's written.

Q Now, I think you indicated that you made a decision not to implement the law?

A That's correct.

Q And, therefore, the law was never implemented?

A That's correct.

Q And, therefore, you cannot tell us whether in fact the law as implemented would require people to pray?

A That's correct.

MR. ROBERTSON: Your Honor, without the Clerk I have to work this way.

THE COURT: Yes.

Q I would like to show you what will be marked Intervenor's Exhibit Number 11 and ask you to read that.

THE COURT: Is that in evidence?

MR. ROBERTSON: For identification, your Honor.

I will refrain from moving all my exhibits until my case.

THE COURT: All right.

For my benefit, what is D-11?

MR. ROBERTSON: A memo from the superintendent of (p. 188) the Hopewell Regional Schools to his teachers implementing the law.

MR. ALTMAN: Who is the—

MR. ROBERTSCN: Dr. Noonan.

MR. ALTMAN: Is there a date on it?

A December 22.

Q Excuse me, Doctor?

A December 22.

Q Have you had an opportunity to read that?

A Yes.

Q As a superintendent, could you tell us whether in fact Dr. Noonan's procedure would have worked in Princeton?

A Probably not.

Q And is there a particular reason why it would not have worked?

A His schools are very different from mine. I would anticipate he would have much less opposition from the personnel that we have. It is much more of a hoe homogenous community, Princeton.

Q Is your testimony then that it is the nature of the composition of your community—

MR. ALTMAN: Can I—I'm sorry.

First of all, we don't know for the record, and I don't know if your Honor knows, what we are even talking about as being Dr. Noonan's—

(p. 189) THE COURT: I can guess, I don't know.

MR. ALTMAN: I'm just reading it now. The problem with it is that Dr. Noonan isn't here, and I don't think the document can necessarily speak for itself.

I think it would be more proper—

THE COURT: Well, let's go on the assumption that's the procedure that was adopted in Hopewell, and the question is would that procedure have worked in Princeton, and the answer is no.

MR. ALTMAN: That's fine. Because I know Dr. Noonan has various nuances and qualifications with regard to this. I don't have him available.

THE COURT: That's all right. The examination is simply whatever is set forth on this document, if implemented in Princeton, will it work. Yes, that's how I understand it.

MR. ALTMAN: That's fine.

Q Is it your testimony then that it is the particular composition of the Princeton population, student population, that persuaded you in your judgment not to implement the law?

A That's it in part. It was also my—as you probably read, are aware, the individuals differ in their opinions of things.

Dr. Noonan and I may well differ in what we feel our roles as superintendent should be in a case like this.

I had other reservations that would also have (p. 190) come to play, an intertwining of the two, that probably would have stopped it, rather than one aspect.

Q And the reservations that you were speaking about are your personal reservations as to the law is what?

A Intent.

Q Going back to the language of the law. Does that require you as superintendent to direct children to do anything but remain silent?

A It gives a purpose for the silence, contemplation, as I recall the language.

Q Let me focus on my question. Does that require you as a superintendent to mandate or do anything—

A No, I'm sorry. No, it does not.

Q Is the use of silence in schools common?

THE COURT: Excuse me. Is it what?

MR. ROBERTSON: Common.

A Sometimes not as common as we like to see it. But it is used for various purposes.

Q Would you amplify on that last comment that you added, "sometimes not as common as we would like to see it"?

A When you're dealing with children, you sometimes wish that they would be more quiet.

Q You referred to recent reports with regard to the state of our educational system, and I think in particular with regard to the length of the schoool day?

(p. 191) A That's correct.

Q Could you please inform Judge Debevoise as to what report you are speaking of?

A A series of national reports that have come out this past three or four months. The most prominent and most well known is the so-called Bell Commission, the Na-

tional Commission on Excellence, which indicated that the national education system was in a state of crisis and listed a series of things the Commission felt should take place to deal with that, and pointed out the discrepancy between the amount of time spent in schools in the United States compared to some of the other countries, that we feel are either social or economic competition.

Q Did that report characterize the concern as being a function of the amount of time provided by the curriculum as opposed to a concern for the amount of time being utilized for learning?

A I don't know that it made a distinction. I think that it is tied in with a lot of the research in the last 23 years which indicates that affected schools are the ones that have engaged time—more time on task. The more time that you have on task, the higher the learning outcomes are.

* * *

(p. 196) THE COURT: It's different in Princeton from other places?

THE WITNESS: Yes. We have students who come from homes that often were a very highly educational level of a parent, very high expectations for achievement, seriourness of purposes available, as opposed to a place where people are trying to exist and have a lot of other things on their minds.

That's why I'm answering in terms of socio-economic.

Q Is it fair to say that students in your experience who come from homes where there are defined educational goals have an easier time bringing to the classroom educational experience?

A Yes.

Q With a seriousness?

A Yes.

Q Is Princeton representative of the school systems that you have worked in in this regard?

A Princeton is a very complex district because we have students who come to us from all varieties of levels of socio-economic background and education. It is atypical in terms of the mixture.

So, it would not necessarily be reflective, (p. 197) certainly, of my experience in Birmingham, which is a very different kind of setting.

Q So do I—am I to understand that Princeton is unique in your opinion with regard to students' commitments to the educational experience?

A No, I wouldn't say it's unique. I think that my experience in Summit was very similar. That, again, is a town that has a lot of the same characteristics as Princeton.

Again, I think you can make a mistake to characterize Princeton as one way anything. Princeton's uniqueness is in its diversity, not one definition of what what it is as a commuity.

Q Doctor, I think you testified that the students have the opportunity to contemplate throughout the course of the day?

A Yes.

Q To be silent?

A Yes.

Q What type of opportunity is provided?

A Depends on the teacher and the activity at hand.

They have free time during the day when either there is a recess for younger children or for nonscheduled periods for older students where they can be silent or not silent, or any manner of topics that they want to deal with. Within the context of the school day, it depends on what the

• • •

(p. 199) Q Provide for a moment of silence.

Do you recall when you first saw what the terms of the Act were?

A No, I don't think I can recall that specifically.

Q Was it early in your awareness of the debate or late?

A Late, I would say.

Q Was it after the Act had been passed?

A Certainly the details were, I think, a general idea of around the time of the passage and the veto and the overriding of the general nature of it. But the specifics, I really don't.

Q When you received the specifics, did it compare to what you had a general idea of?

A Yes.

Q And in what regard did the specific language comport as your general idea?

A Then it dealt with the moment of silence; that it was to be a uniform opportunity which obviously would have to be imposed by the teacher; that it use the language of contemplation I think was probably the third area that first what I thought.

Q Do you acknowledge a meaning for contemplation that includes reference to things religious?

MR. ALTMAN: I'm sorry, I didn't hear the question.

(p. 200) Q Do you acknowledge the definition for contemplation that it includes things religious?

A In a general way, yes.

Q Do you acknowledge a definition for contemplation that includes things nonreligious?

A Yes.

Q Introspection, what definition do you acknowledge for that?

A I would be hard pressed to make a specific definition on that.

Q From a categorical standpoint, does it include things religious?

A Yes.

Q Does it include things nonreligious?

A Yes.

Q Can you tell this Court whether the children in Princeton, if required to observe the moment of silence, would pray?

A Some of them might. Some of them would not. I'm not sure I can get them to observe a moment of silence to find out.

Q Is there a control problem there?

A I think there would be in a case like this. Again, the problem is the uniform imposition of an opportunity for introspection. I think in the minds of most of the kids it (p. 201) would smack of imposition of religious overtones, whether that was intended or not.

Q Doctor, do they say the Pledge of Allegiance in Princeton?

A We hope they do. They are supposed to. We give them an opportunity to do that.

Q Is there any problem with that?

A Yes.

Q What's the problem?

A High school students tend to particularly find that nonserious activity and not to take it as a serious action.

Q Has there been any reported action to the phrase, "One nation under God"?

A No.

Q Do they sing any patriotic songs in Princeton?

A On occasion, I would assume.

Q Several of those songs reference God?

A Yes.

Q Has there been any reaction to the references?

A Not to the patriotic songs. We have had a tremendous reaction to songs that involve various holidays.

Our choral program, particularly at the high school and middle schools, is essentially based on classical music, most of which originated in the church setting. Occasionally we get comments from parents about that.

(p. 202) Q They are offended by—

A On occasion.

Q In what respect?

A You would get the occasional parent who feels that any reference to God in the curriculum should be removed. I think most of our parents, in the terms of music, would see it as having a curricular aspect that is serious in nature and as being accepted as nonreligious in its intent.

It is not a major problem, but we do have the occasional person who is concerned.

Q So there is some sensitivity in that area based on your experience?

A Yes, a lot of sensitivity on the whole issue of church and state in Princeton.

Q More so than other places where you have been a superintendent or teacher?

A Yes.

Q So in that regard, Princeton may be a unique community because of this particular sensitivity?

A It's different than a lot of communities. Whether it is unique in that area I don't know.

Q I'm only going on the basis of your experience.

Doctor, what is the Pledge of Allegiance used as in your school?

A It is part of the opening exercise.

(p. 203) Q What's the purpose of the opening exercise, from an educational standpoint?

A I'm not sure there is one. It is a tradition, and essentially, it is the way you clean up a lot of loose ends at one time.

Q Would you explain that in a little bit more detail?

A Well, we are required, again, by law, to have this Pledge of Allegiance. We also have certain housekeeping chores in terms of announcements. Attendance has to be taken. It is all done at one time.

Q But from an educational standpoint, not specifically instructional educational standpoint, not overall educational standpoint, you're not sure that these opening exercises provide—

A No. I would personally comment. My personal opinion is that the Pledge of Allegiance, for example, is an important action because of certain values that you want to inculcate in students. But there is no educational point beyond that, in my opinion.

Q Would you tell this Court if the moment of silence were mandated after a Pledge of Allegiance, what the children would think of?

MR. ALTMAN: Objection. I don't think anybody is qualified. He can make a prediction.

THE COURT: That's all he can do. He got his (p. 204) opinion on a number of subjects. That's permissible.

A Well, assuming they would do it, I would think a whole variety of thoughts would occur to them.

Q So there wouldn't be a single thought that you could really speculate upon?

A No.

Q The hot line message that you received from the Department of Education, based on your experience, was that the normal procedure for providing you with information on new legislation affecting education?

A Only in respect that because of the language of this particular Bill, it was effected immediately. So under circumstances like that, they have used a hot line when normally the bills have a longer period of time to be implemented. And they tend not to use the hot line under those circumstances and just send out a written information.

Normally, our channel from the state is through the county superintendents who have met with the Commissioner and are prepared to answer questions and interpret information. But we have received other hot lines, if that's the question.

Q Is it fair to say with regard to this Act, however, those procedures that you just referred to, questioning how you implement it, weren't provided?

A That's correct.

(p. 205) Q And, indeed, you were informed that they wouldn't be provided?

A That's right.

Q And, indeed, you were left to your own devices?

A I would say that's probably accurate too.

Q How did you feel about that?

A I have mixed feelings. At one level they very rarely leave us to our own devices, so it was a relief.

At another level, since it was such a thorny issue, it would have been helpful to have had some further guidance, or at least interpretation of what's meant.

For example, following up your earlier question about when the Pledge of Allegiance is done; the Bill calls for it to be done at the beginning of the school day. Back at our high school, those activities take place between third and fourth period.

So, having implemented it, could we have waited until that period of time to have done it? Would it have to take place at the beginning of the first period?

There are things like that that clarification would have been useful on.

Q Doctor, have you, during the course of your experience as superintendent of Princeton schools, had any reaction to sex education courses?

A If I had or have I received reaction?

(p. 206) Q Have you received?

MR. ALTMAN: Can I ask where we are going?

THE COURT: Well, let's go a little ways, but not very far.

A A few.

Q On what basis?

A We are not doing enough, we are doing too much. I want my child to have more of that. I want my child not to participate. We have had both kinds of reactions.

Q Have any of those reactions been based on religious scruples, principals?

A I would have to say, truthfully, it has never been put in that context to me.

MR. ROBERTSON: Judge, can I have one minute?

THE COURT: Sure.

(Pause.)

MR. ROBERTSON: No more questions.

THE COURT: Any redirect?

MR. ALTMAN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. ALTMAN:

Q I take it from one of your last responses that what has been referred to as opening exercises in the high school in Princeton does not take place. There is no opening exercise?

A Not if you consider opening a school day. We have a (p. 207) home room period which takes place between third and fourth period in the morning.

Q But, the announcements, what you call pulling loose ends together—

A That's taking place at that point, in the home room.

Q And the Pledge of Allegiance was done, you said, between third and fourth period?

A That's home room, yes.

Q That is the home room?

A Yes.

Q So that's in the middle of the day?

A Middle of the morning, yes.

Q You were asked if silence could be a useful tool to redirect. Do you think that silence at the beginning of the morning is the most appropriate time for redirections, or would there be other times during the school day where there is a greater need for redirection?

A Well, the redirection that I had in mind, say between reading and math where you were breaking your teaching, particularly appropriate, say at the elementary level, where the same teacher teaches a number of subjects.

Beginning of the school day, you're not redirecting to anything at that point.

Q So you don't see any particular necessity from an educational or redirecting standpoint for a moment of silence?

(p. 208) A You are trying to get them reved up and into the work, not slow down at that point.

Q You were asked by Mr. Robertson to predict—give your opinion as to prediction as to what students might

do during the moment of silence if it were implemented in Princeton. You said there would be a variety of things that they might think about.

Might religion be one of those?

A I would think so, yes.

Q And you were talking before about the influence of the home, in the context of Princeton students coming from homes that socio-economic background was higher, better educated parents and so forth.

Wouldn't the same principle apply if the student came from a very religious home? Wouldn't it—wouldn't you think it would follow that there would be more likelihood the students would tend to use the moment of silence for prayer?

A Yes, I would believe that.

THE COURT: If that is true, why do we have the Council of Churches so vigorously opposing the moment of silence?

THE WITNESS: I talked to my minister about my position on this Bill. I'm a minister's son. So I have sort of mixed feelings about the position I was taking on it. I felt I was right, but I didn't want to offend my religious (p. 209) mentor.

So I talked about it, and, basically, my own minister agreed with my position, which is that it tends to be an undermining of the religious activities. The proper role for religious training is the church, and personally, I'm affronted from the argument of the need for this as a religious activity.

I feel my own religion should be strong enough to stand on its own without help from the state.

THE COURT: Well, then the religious home of that nature would not be participating in the moment of silence for religious reasons?

THE WITNESS: I use moments of silence during my day to pray, so I wouldn't rule that out.

THE COURT: Would you use an enforced moment of silence to pray?

THE WITNESS: I really don't know. Probably some of the time I would and some of the time I would have my mind on other things.

THE COURT: All right, thank you.

Q To follow up Judge Debevoise's question to you; wouldn't you think that the conduct of a—you have had experience reaching third to six graders, I understand?

A Yes.

Q Don't you think the conduct or the response of a child, (p. 210) say grades 4 to 6, might be different than the response of an adult such as yourself?

A Yes.

Q A child might be more directly influenced by a teacher or peers in the classroom?

A Yes. A child's reaction is going to be different than a teenager's reaction.

Q You may have answered this, but let me go over a couple of points.

Would you classify the moment of silence as time on task as you define time on task for Mr. Robertson?

A No.

Q When Mr. Robertson asked you if you have personal reservations with regard to the enforcement or the implementation of the moment of silence and you said—he asked you if that was with regard to the intent of it, and you answered yes.

You didn't really—I don't know, you may have already indicated what your personal reservations are. Were they premised on educational values, religious, constitutional?

A I have two levels of reservation. One was that it was a waste of time and a potential disruption that we didn't need in the educational process. The other was the more fundamental kind of reservation about whether in fact it was (p. 211) actually an appropriate action legally to take.

Q You also responded affirmatively to a question put to you by Mr. Robertson. He said to you: There is no requirement of the superintendent to do anything in the moment of silence. You looked at the law you had looked at and indicated that is correct.

Were you talking in terms of the express language of the statute, or were you talking about, as well, the natural implications of the law?

A Express language only. The law, I would have a responsibility because, again, I would have to oversee the implementation. The law doesn't state it so.

THE COURT: Mr. Altman, I think we must have exhausted this subject.

MR. ALTMAN: I think so, Judge. I just had a couple things I'm running through. If I could have half a minute?

THE COURT: All right.

(Pause.)

MR. ALTMAN: I'm through.

THE COURT: Good.

Yes, Mr. Robertson, anything more?

MR. ROBERTSON: No recross.

THE COURT: Fine. Thank you very much. You may step down, Dr. Houston.

(p. 212) (Witness excused.)

THE COURT: Who is next?

MR. ALTMAN: Mr. Chuman.

JOSEPH NATHAN CHUMAN, affirmed.

THE COURT: Yes, go ahead. Full name?

THE WITNESS: Joseph Nathan Chuman. C-h-u-m-a-n.

DIRECT EXAMINATION

BY MR. ALTMAN:

Q Mr. Chuman, are you presently employed?

A Yes, I am.

Q What capacity?

A I'm the leader of the Society for Ethical Culture in Bergen County, New Jersey.

Q Does that have a name, that society?

A The Society for Ethical Culture.

Q Bergen County Ethical Society?

A Yes. Ethical Culture Society of Bergen County.

Q Can you briefly define for us what the objectives of the ethical culture society are?

A Yes. The Ethical Culture Society is a liberal religious organization that exists to promote respect for the worth and dignity of persons as its highest concern.

Q What is your role as the leader of the Ethical Culture Society?

A Well, as leader of the Ethical Culture Society, I serve (p. 213) in a function of the—being parallel to that of clergy person in a conventional religious organization.

I speak at our regular Sunday morning meetings. I do pastoral counseling with members and others, and I

represent the values of the Ethical Culture Society movement in broader society.

Q I take it then that there are other chapters or ethical culture societies besides the one in Bergan County?

A Yes.

Q And are there others in the state of New Jersey?

A Yes.

Q Are they independent of one another?

A Yes. They are organized congregationally for the most part, although there is a national organization of ethical societies.

Q Are you registered—or I'm not sure you have to be registered as a lobbiest—or identified as a lobbiest in connection with that group or any other?

A No.

Q Do you represent that group from time to time in expressing its interests or objectives to the legislature?

A Yes, I do.

Q What form does that take?

A Well, it can take the form of writing letters to state Senators and Assemblymen as well as federal officials on (p. 214) relevant issues. It can involve personal discussion with representatives, and from time to time

I've given testimony before hearings in the legislature on issues on which I have some expertise.

Q What is your area of expertise? Can you explain what your background is by way of experience and education?

A Yes. I'm a graduate of Queens College in New York. I'm graduated with honors in classical Latin. I also have a professional certificate in pastoral counsel from the Post-Graduate Center for Mental Health in New York.

I have a masters degree from Columbia University in the philosophy of religion.

I'm presently a doctoral candidate in philosophy of religion at Columbia.

I've also been involved organizationally with groups who promote civil liberties, human rights, so on and so forth.

Q Do I take it that your time, let's say your non-recreational time, is devoted entirely to either pursuing your education or your Ethical Culture Society activities and the other things you mentioned as opposed to any other employments—

A Yes, I have no other paid employment. I also raise a family.

Q When did you first become familiar with what has been (p. 215) identified as the Moment of Silence law?

A Oh, I don't remember the exact date. It was probably early in 1982.

Q Can you tell us how that came about?

A Well, through information that I received from people who were involved in the civil liberties field, from reading the newspapers, so forth.

Q What did you first learn about the Moment of Silence law in the initial stages? What did you understand it to be?

A Well, my understanding throughout has been that it was a way of returning a form of prayer to the public schools by calling it something else.

Q And that was your impression when you first learned about the law?

A Yes, it was.

Q Can you tell me from what you derived that impression?

A Well. I think around the time that the law was formulated, on a national scene, there was certainly a lot of discussion in certain political camps with regard to restoring prayer to the schools, discontent with the Supreme Court's decision which banned verbal prayer from—organized prayer from the schools, and just the fact that on the face of it, it seemed to me that since a moment of silence can be mandated by any teacher at any time—previously I was a teacher in the New York City public school system—it seemed to me on 'he (p. 216) face of it that an act of the state legislature was, in effect, a redundancy, and had to have a purpose other than the one that was stated.

Q How long were you a teacher in the New York school system?

A For one year.

Q What grade level was that?

A Elementary grades.

Q When you learned of the Moment of Silence law in early 1982, I think you indicated, had you formed this impression that this was to reintroduce prayer? Did you take any action in response thereto?

A Well, initially I had written letters, I believe, to Senator Feldman who is the representative state Senator from the district in which I work, which is the Teaneck area.

Also, a letter, I believe, to the Governor. And had generally discussed the issue with others, including clergymen in my area whom I had worked with with regard to certain issues of mutual concern.

Q As time passed, did you take any further action or did your—did the Ethical Culture Society as a group take any action or respond to the knowledge of this proposed legislation?

A Well, I don't recall. We may have passed, or the board may have passed a resolution in opposition to it, but I'm (p. 217) not—my memory fails me on that point.

Q Prior to the adoption of the law, did you continue to have occasion to, say, during the time that it was being debated, or during the time of the Governor's veto, have occasion to read about the law in the newspapers?

A Sure. I followed the case as it progressed.

Q Did you ever form an opinion that the law was for any purpose other than to introduce prayer in the schools?

A That it was for other—did I form that opinion?

Q Yes.

A Well, there were obviously people who did have other opinions, and I familiarized myself with their viewpoint, but it was not a conclusion that I, myself, had drawn.

Q Did there come a time when you had occasion to testify or appear before a legislative committee?

A Yes.

Q Do you recall how that came about?

A Well, yes. I had heard that there were going—there was going to be an open testimony, relatively informal nature, held by Senator Feldman's—called by Senator Feldman in his capacity as chairman of the Senate Education Committee, and I testified at those hearings.

Q And would you recall the date?

A Yes. It was June 21, 1982.

Q And do you recall how long you were there that day (p. 218) before the Committee?

A Well, my own testimony was perhaps 15 minutes. The hearings lasted about an hour and a half, two hours.

Q Were you there for the entire period of time?

A Yes.

Q And the hearing then concluded for the day?

A That's right.

Q While you were there, do you recall who else may have appeared and testified before the Committee?

A Yes. Assemblyman Zangari was the first to testify. A Ms. Judy Merciano, who at the time was the legislative director for the American Civil Liberties Union, testified.

I gave testimony. There was a representative from the New Jersey Educational Association who testified. Another gentleman who I don't—whose title and name I don't recall, who also represented some aspect of the educational interests in the state testified, and a Mr. Herbert Garvel from Fair Lawn, who is a parent and a long-time member of the Bergen County Chapter of the American Civil Liberties Union, testified.

Q Did any of the witnesses who appeared from some educational group, for example, NJEA, testify affirmatively or at all with regard to the educational value of this proposed moment of silence?

A Well, no. The people who came from representing (p. 219) educational interests were opposed.

Q Was there any—while you were there, anyone that was not directly affiliated with an educational, say, association, but rather an educator who came or some experts, psychologist, trained educator, to argue that this had an educational component?

A No.

Q Did you hear anybody on the Committee argue that there was an educational component, if you recall?

A My memory on that is vague. I do recall that there were only three Committee members there. Two of them were in favor of the Bill at the time and one was opposed.

Q And who are you talking about?

A Senator Feldman was opposed. Senators Dumont and Dalton were in favor it.

Q You said you heard Senator—or Assemblyman James Zangari testify?

A Yes, he was the first to testify.

Q Do you recall what he stated was—was he in favor of the adoption of this law?

A Oh, very much so.

Q Did he state his reasons?

A Well, yes he did. He thought that the moment of silence would be useful in the schools and would serve an educational purpose.

(p. 220) Q What purpose?

A Educational purpose.

Q A teaching purpose?

A Yes.

Q Did he expand on that and say in what way?

A He may have, but I don't recall.

Q Did he express any religious intent that he had with regard to the adoption of this law?

A Yes. It was strongly implield in his statement.

Q And do you recall what the nature of his statement was from which you made this conclusion?

A. Yes. I recall very vividly that he talked in his testimony about his own background. He said that although he was a Catholic by conviction, as a child he had gone to Protestant schools. He had been encouraged to participate in Protestant oriented prayer, and he said prayer had never done him any harm.

Q Did you have occasion to speak with Assemblyman Zangari at any time personally?

A Yes, I did.

Q And when did that take place?

A Right after the hearings concluded.

Q What was your purpose for speaking with him?

A Just that I think he wanted to speak to me.

Q He sought you out?

(p. 221) A Well, I don't recall precisely, but he was certainly interested in what I had to say.

Q Can you tell us what he said to you?

A Well, again, I don't recall the entire conversation. But I had asked him specifically at one point whether he would be happy to see the restoration of verbal prayer, articulated prayer in the schools as well as Bible reading. And he said he most definitely would. And beyond that, I had asked him, as I recall, what his concerns were for those parents who wished to raise their children as atheists.

And he said, "Oh, you must mean people who are involved with Madeline Murray O'Hare." He went on to

say those people are so few in number, that those interests, we can basically afford to discount him.

Q Did he convey a perjorative attitude towards those type of people by either his words or demeanor?

A Yes, that he was basically discounting the convictions of atheists or "nonbelievers."

MR. ALTMAN: May I have one moment, your Honor?

THE COURT: Yes.

(Pause.)

MR. ALTMAN: I have nothing further, your Honor.

THE COURT: Mr. Robertson.

MR. ROBERTSON: No questions.

THE COURT: Good. Thank you very much.

* * *

(Excerpts of Trial Testimony of Marianne Rhodes)

Rhodes—direct

(p. 225) A Yes, sir. It is basically part of my job responsibility to monitor the committees, to testify, to track, follow the legislation that affects public education.

Q I take it that your role with regard to this law was to monitor the legislation?

A That's correct. And also to testify if my director had not been present.

Q Did you have any responsibility—was it part of your job to prepare any report, verbal or oral, for the use of the New Jersey Education Association, School Board Association?

A School Board Association.

I took minutes, handwritten minutes of the Committee meeting for use, basically, to brief the rest of the staff as to what occurred. It is also helpful to us when we look back on the legislation to remember what went on to help us in our lobbying efforts.

Q Do you have any specific recollection of hearing various Assemblymen or Senators speak with regard to this proposed legislation?

A Do you mean in the Committee room when the Bill was posted for discussion?

Q Yes.

A Yes.

Q And where else would they be speaking that you would have occasion to hear them?

(p. 226) A On the floor of the legislature when the bill is debated.

Q When would you have had occasion to take notes?

A I took notes in Committee.

Q In Committee. Okay. That's what I'm referring to.

A Um-hum.

Q Do you recall who you had occasion to listen to of the Assemblymen and Senators before the Committee hearings?

A Yes, in the Assembly Committee, Assemblyman Zangari was present to argue his position on his legislation.

Q And did you also attend hearings before the Senate Committee?

A In the Senate Education Committee I recall hearing Senator Feldman speak on the legislation. Once again, Assemblyman Zangari and Senator Ewing made some very brief remarks.

Q Do you recall specifically what was said by Senator Zangari at the Assembly Education Committee hearing?

A Assemblyman Zangari indicated that he had worked very hard on the legislation, that it had been reduced to, I think he said, 50 words or so. And that the intent was basically to provide the minute of silence at the beginning of the school day.

Q Do you recall anything else he said? If you don't recall, just say so.

(p. 227) A I don't recall. I do have my minutes.

Q You prepared your minutes contemporaneously with attending at the hearing?

A That's correct.

Q Did you subsequently type up those minutes?

A When I returned to the office—I don't recall whether it was the same day or that week or whenever—I dictated from my handwritten minutes the minutes that could be reproduced for the rest of the staff.

Q And would you say that your handwritten notes, taken contemporaneously with the hearing, was an accurate reflection of what you heard at that Committee hearing?

A Yes, sir.

Q And would your typed report accurately reflect those minutes and what was said?

A Yes, I believe so.

MR. ALTMAN: May I have a document marked for identification? I believe it will be 77.

(Exhibit marked Plaintiffs' Exhibit P-77 for identification.)

Q Miss Rhodes, would you inspect the document marked just now for identification as P-77? Can you tell us what that is?

A Yes, sir. The first document dated May 18th is the recorded minutes of the Assembly Education Committee that had been dictated by myself and typed by my secretary. The second

* * *

(p. 229) admissible for the purpose of showing legislative intent. I don't think Assemblyman Zangari's own personal

motive is relevant. But I think it is admissible on the independent ground it is not hearsay as to what the public and the school board served by the public, what impression they got of the purpose for the legislation.

For that purpose I think it is admissible. So you may inquire.

MR. ALTMAN: I skimmed over the recollection.

MR. ROBERTSON: I'm not going to insist on it. I think it would ease the burden if she feels more comfortable reading it. I'm not going to insist on past recollection recorded.

MR. ALTMAN: We have been through that before. I know the witness is more comfortable, in fact, only is dependent upon the written record.

THE COURT: All right, fine.

Q Would you please read the statements recorded there attributable to Assemblyman Zangari?

A Assemblyman Zangari was present to speak in support of his Bill. He indicated that the Bill had been reduced to only 54 words, and that it was important that our society get back to the religious values which are deeply imbedded in our ideals.

He quoted from President Reagan, who had (p. 230) expressed his support for a constitutional amendment to permit school prayer. I believe that's the only statement that I have recorded from Assemblyman Zangari. But I wish to point out, I just took down the things that I felt were significant.

Q Was there another occasion that you listened to Senator Zangari, I think you said before the Senate Committee on September 23?

A Assemblyman Zangari explained his Bill, using the language of the Bill. And then in response from Senator Feldman, Zangari responded, "They publicly won't do it unless they are directed."

Q What are you talking about, "do it"? What was referred to there?

A Senator Feldman asked the question, "Since there is nothing that prohibits students from praying, why is this Bill necessary?"

Zangari said, "They publicly won't do it unless they are directed."

Q Any other remarks that you felt were significant that you recorded there?

A I have recorded remarks from Senator Ewing. However, it is not clear to what he was referring in my minutes.

Q May I see that document, please?

Thank you.

You said that it wasn't clear what Senator Ewing

* * *

(p. 234) Q He testified about Assembly Education Committee meeting on June 21, 1982. Do you have notes with regard to that meeting?

A Not that I'm aware of, no. And I don't recall attending that meeting.

Q Do you recall anyone from your Association attending that meeting?

A Not to my recollection.

Q That is a different meeting, and distinct from the meeting that is referred to in your notes?

A That is correct.

Q During the course of the Assembly meeting, which is the earlier of the two, as I understand it, was there any discussion about the pedalogical—pedagogical use of the moment of silence?

A Would you repeat that, please?

Q Sure, certainly.

During the Assembly meeting was there any discussion about the pedagogical use of the moment of silence? Is the word "pedagogical" bothering you?

A No, I understand you. But you're talking about during the meeting?

Q Yes, ma'am.

A Basically, whatever is in my notes is what I recall.

Q So you don't have any independent recollection of (p. 235) anything other than what is in your notes?

A No, sir.

Q And do your notes accurately represent all that was said during the course of the meeting?

A I believe they represent the points that I felt were significant.

Q Is it fair to say then that they were points that struck you, but not necessarily all the points mentioned?

A That's correct.

Q Would that be true for the Senate notes as well?

A Yes, sir.

Q I've handed you—let me go back.

With regard to the Assembly meeting, how long was it?

A The duration?

Q Yes.

A Generally, the meeting—I don't recall. They are generally two hours.

Q And what portion of the meeting was devoted to 1064, if you recall?

MR. ALTMAN: Objection. She said they are generally—

THE COURT: She may recall that part. Overruled.

A There were a number of other bills on the agenda. I can't say specifically.

* * *

(p. 237) A Yes.

Q And do you have—

MR. ALTMAN: Can I see that thing before we continue any questioning on it?

THE COURT: Yes.

(Pause.)

THE COURT: Do you have a question?

Q Do you recall from whence came those comments about the use of the moment of silence, and I'll quote, "To

provide students with an opportunity to collect their thoughts and prepare for the day's learning''?

A Obviously one of the proponents had argued that as stated there.

Q Was it merely one proponent, or is it as the statement says, ''If, as proponents argue—''

A Could have been several, um-hum.

Q Is it fair for this Court to understand, for us to understand, that there was sufficient group of individuals who proposed this legislation for that purpose that caused you or your Association to include recognition of that in this statement?

MR. ALTMAN: Your Honor, I don't think there is a sufficient foundation to utilize this statement to elicit from this witness the evidence in the statement.

THE COURT: Well, she has said it refreshes her (p. 238) recollection.

MR. ALTMAN: I don't know that she did say that.

THE COURT: That's what I understood her to say.

MR. ALTMAN: I thought she said in response to a particular remark.

THE COURT: No. I'll overrule the objection.

Q Ms. Rhodes, is my question clear to you, or would you want to hear it again?

A Would you repeat it, please?

Q All right.

That paragraph—that statement, would it be fair for this Court to infer that there was sufficient—there were

sufficient numbers of proponents that proposed this legislation as being for the purpose of permitting children the opportunity to collect their thoughts and prepare for the day's learning, so that your Association felt appropriate to include that as being one of the positions on the Bill?

MR. ALTMAN: I object to the form of that question.

THE COURT: The form is a little awkward.

MR. ROBERTSON: It is cumbersome, Judge. I'll take any help I can get to get it out.

Q What I'm trying to search for, and maybe I can do it this way: I know this is cross-examination, but there were proponents who took that position, were there not?

(p. 239) A I had heard that argument.

Q And that argument had been an argument during the course of the debates for this legislation?

A From some proponents.

Q And there were sufficient proponents so that your Association felt that it should be included and recognized in the position statement that you took?

A It should be refuted if we were opposing the bill.

Q Fine. But it was included as being a recognized position on the Bill?

A An argument.

Q That had been made?

A That had been made.

Q All right.

MR. ROBERTSON: No further questions.

THE COURT: Any redirect?

MR. ALTMAN: Yes, a few questions on this document, your Honor.

REDIRECT EXAMINATION

BY MR. ALTMAN:

Q Ms. Rhodes, this document, from its date, was prepared apparently for submission to the Assembly or the Senate after the Governor had vetoed this legislation?

A That's correct.

Q And, therefore, is it fair to assume that these (p. 240) arguments that were being advanced by some alleged proponents that there was an educational purpose, were apparently being advanced with the purpose of promoting an override of the veto?

A That's correct.

Q And at the time that this was taking place, the Governor indicated, had he not, that the reason for his veto, in part, was that he believed this was unconstitutional?

A That's right.

Q Had you heard—when you say "proponents," you said that you had heard these these arguments were being made. Did you actually hear them being made, you know, in the context of committee hearings prior to the veto by the Governor? Do you recall?

A I don't recall.

Q What I'm trying to find out is do you know where and when this argument developed that there was some educational purpose?

A Whenever the discussion came up, particularly with Assemblyman Zangari, when he was there. I'm sure he affirmed that because of the language that was used in the Bill does not refer to prayer.

Q Can we conclude from this document that this was—this argument was being debated, the position taken by the School Board Association because they were attempting to (p. 241) override the Governor's veto that had rested on the argument that this was unconstitutional, this statute?

A We opposed the Bill.

Q On what ground did the New Jersey School Board Association oppose the Bill?

A On the grounds that we had policy from our delegate Assembly which instructed us to oppose this and similar legislation several years ago, which mandated—and that's a key word—prayer, meditation or silence.

Q So I take it from this position paper that the School Board Association, through its delegate Assembly, concluded that although the word "prayer" had not been mentioned specifically in the legislation, the School Board Association viewed the moment of silence as an effort to reintroduce prayer into the schools, that was the argument being made by the New Jersey School Board Association?

A Yes.

MR. ALTMAN: I have nothing further of this witness.

THE COURT: Anything else?

MR. ROBERTSON: No recross.

THE COURT: Thank you very much. You may step down.

THE WITNESS: Thank you.

(Witness excused.)

* * *

(Excerpts of Trial Testimony Lloyd J. Newbaker)

Newbaker—direct

(p. 246) A Through our lobbying staff, most generally, or through testimony from someone selected to represent our organization.

Q Resolutions, I assume, are reflected in some printed form, such as P-69?

A Yes, they are submitted in written form.

Are you saying the resolutions or the positions?

Q Well, you better distinguish for me the position statement from a resolution.

A That document, I believe, is a statement that—

Q You can hold on to it.

A Yes. This is a document which transmits the position of the Association. It would have been written by the staff and was intended for members of the Assembly and the state Senate.

Q You said transmits the position of the staff?

A Of the Association. It was written by the staff.

Q By the staff. And does it reflect the staff's view, or does it reflect your delegate's view?

A It reflects the delegate's view very distinctly.

Q And how would that be distinctful? What is then the resolution as distinct from a position statement?

A A resolution is, in our terminology, a formal means of communication from a board of education to the Association requesting some action.

Q I see. So the resolution is an internal form of (p. 247) communication or an internal position?

A That's correct.

Q Internal within the New Jersey School Boards Association?

A That's correct.

Q And the position paper such as the exhibit in front of you is something used to communicate outside the School Board Association?

A That's also correct.

Q Who serves as lobbyists between the School Board Association and the legislature?

A For our Association?

Q Yes.

A Our staff is headed by Octavius T. Reid, R-e-i-d, Jr., Marianne Rhodes, June Reock, R-e-o-c-k, and Dennis Crowley, I believe is on our staff at the time, and he has since left and joined the Department of Education.

Q It has already been testified to by Ms. Rhodes that the document in front of you—I think it's P-77—

A I think it says Exhibit 69 in the corner, I believe.

Q Okay, sorry. That's correct. P-69 reflects the position taken by the New Jersey School Board Association with respect to the Moment of Silence law?

A Yes, I believe it adequately represents our position.

Q Can you tell me how it came about that the New Jersey (p. 248) School Board Association adopted that position?

A This was prompted by a resolution from Montvale Board of Education in Bergen County. I believe it was submitted for action for the June 13th, 1981, delegate Assembly. The resolution—

Q Dr. Newbaker, let me mark something and maybe I can assist you.

MR. ALTMAN: Do you want me to mark this?

THE COURT: Yes.

MR. ALTMAN: I think it's P-78.

(Exhibit marked P-78 for identification.)

Q Dr. Newbaker, I show you what I've marked P-78 for identification. Can you tell me what that is?

A This is a resolution that was received from the Montvale Board of Education in Bergen County. It also contains the background and discussion information and the recommendation of the resolutions committee to the delegates.

Q And does that have a date?

A It has a date of June 13th, 1981.

Q And what was resolved by that Montvale school board?

A The school board is requesting that period of silent meditation has its place in the family and church, and that time for silent prayer and silent meditation is available to those who seek it on a given day, and that it's important for for American citizens who do not wish to engage in prayer and (p. 249) meditation—the First Amendment to the Constitution of the United States provides for the separation

of church and state. And whereas Bill A-2197, which has been passed by the Senate and Assembly, provides for a one-minute period of silence in public schools for the participation of all students at two specific times during the school day, it is, therefore, requested and resolved that the Association oppose Bill 2197 and any similar legislation which would mandate prayer and/or a period of silence or meditation in the public schools.

Q I assume that that was received by the staff of the New Jersey School Board Association and they took some responsive action.

A Yes, sir. We developed the background and discussion that is attached. And after having a staff meeting, it became my recommendation to the resolution committee.

Q What became your resolution, as it was proposed—

A The attached discussion and background, yes.

Q Can you tell us a summary—can you tell us what it was that was resolved or recommended by you and your staff to the resolution committee?

A To summarize very briefly, I think we agreed considerably with the intents of the resolution. We spoke a little bit about the Supreme Court, some of the cases that had appeared before the Supreme Court, specifically where there was an intent to overturn or get around the Supreme Court (p. 250) decision.

I think also we cited the United States Federal District Court in the District of Massachusetts where a decision had recently been rendered. And in that particular case, some secular purpose was believed to be intended in the legislation, specifically, greater self-discipline, respecting the

authority of teachers, and we mentioned in the discussion that A-2197 was vetoed by the Governor and we raised the question as to what is the purpose behind the Bill.

We believed that it was the prayer in public schools and the Bill was plainly unconstitutional. I think that was a fair summary. There are other statements here.

Q Did you take any position as to whether the Bill had any substantial educational component?

A Only to the point that the supposed secular purpose is to calm the students and empart an atmosphere of quiet seriousness to the school day.

Q Did you and your staff feel that this legislation would achieve that end?

A I don't think we agreed to that.

Q You said you submitted the resolution in similar format—strike that.

I take it then that because you saw this as a method of reintroducing prayer in school, your staff and yourself recommended to the resolution committee that the New (p. 251) Jersey School Board Association should oppose the legislation?

A Yes, that's correct.

Q What was the next—how does the procedure within your Association then follow?

A This recommendation, as it is here, went before the resolutions committee, which is simply our board of directors, chaired by the vice-president for legislation. It is discussed there and at that point the committee can agree with the recommendation and approve it as it stands. They could

modify it, or, in fact, direct the conclusion to be drawn differently.

Whatever action taken by them is then sent to the school district for their review, and it is subsequently placed on the agenda of the delegate Assembly.

Q What action was taken by the resolution committee?

A It was approved as submitted.

Q Meaning to oppose the legislation because they viewed it as an effort to reintroduce prayer in the schools?

A I assume that the Committee agreed with the statements presented.

Q How did they communicate that position?

A They conveyed this entire document to the school districts.

Q To all 611 school districts?

A To all 611 school districts.

(p. 252) Q So that they will be prepared to have the delegates discuss and vote on that resolution at the next meeting of delegates?

A That's correct.

Q Which would have taken place when?

A June 13th, 1981.

Q And was this resolution voted on at that meeting?

A Yes, sir, it was.

Q And I take it that it was adopted by the delegates of the New Jersey School Board Association?

A It was adopted by the delegates.

THE COURT: Do you know what the vote was?

THE WITNESS: I don't know the vote. The only time we record a vote is when it is a very close vote and account is taken. My impression is, in reviewing the minutes of the meeting, that it was not a close vote.

Q Can you tell us what the—were you present at the meeting of the delegates in June?

A Yes.

Q And can you tell us what the discussion focused on?

A My recollection is that a number of the delegates spoke in opposition to the recommendation. There were several. For the most part, my recollection is correct, advocated returning prayer to the schools.

Q The document that you're holding in your hand now, (p. 253) which we have marked at P-77, is the resolution. Earlier in your testimony we were referring to a document that had been identified by Ms. Rhodes as a position statement. I believe that was P-69?

A Yes, sir.

Q Does the position statement flow from or is it written up as a result of the action of the delegates and the adopted of the resolution?

A All of the authority for staff action comes from the delegate decision that I cited.

Q Would the delegate—strike that.

Would the resolution be communicated to legislators by your lobbyists, or would your position be in the form of a position statement or oral communications?

A Would you repeat that, please?

Q Did that resolution actually get presented in its form as it exists in P-77 to the legislature?

A No, it was not conveyed in this form.

Q I take it then that the position is conveyed in the form of the position statement earlier identified by Ms. Rhodes as P-69?

A It was conveyed not only in that position statement because this was submitted at a time—the staff's discretion, that they wanted to bring again to the attention of the Senate and the Assembly our position since they were (p. 254) preparing for a vote on the Governor's veto. They were preparing to override it.

However, I suspect also that our staff would have conveyed our position to the Assembly and Senate Education Committees.

Q Is the position statement that I marked P-69 in front of you?

A Yes.

Q Ms. Rhodes was questioned—I believe you heard that questioning—as to the fact that there are statements contained therein that proponents argued that the proposed moment of silence legislation had an educational component in that—to provide students with an opportunity to collect their thoughts and prepare for a day's learning.

A Yes.

Q Was that proponent—does that refer to legislators or does that refer to someone else?

A I suspect at this point, since the issue had been before the legislature and the Governor for some time, that it could represent our staff's impression of anyone who might argue for the Bill.

Q It might be a legislator or it might be someone from a school board?

A It could have been. It might even have been—might have been some of our members or even delegates.

(p. 255) Q And the decision of the delegates was to reject the argument, and I take it from the position statement that they felt such legislation was not necessary?

A That's correct. The New Jersey School Boards Association and local boards have often taken strong positions regarding local prerogative and to oppose mandates.

Really, I believe to add to that if boards felt that this was necessary from an educational perspective, they would have had the authority to have taken action locally.

Q Well, I think we have made clear in the questioning that the New Jersey School Boards Association saw no educational value in this proposed legislation What was your personal opinion?

A Well, I would agree with that position. I think that—first of all, I think it should be said that if there was that great an educational value, certainly it would have been used to a broader extent. I think teachers would use the circumstance. They certainly have that prerogative in controlling their classroom. If it was a community-wide issue, I would have thought that local boards of education would have passed some policy to imply that period of silence would be used.

Q The resolution—in your testimony you referred to—when we talk about the resolution, you referred to Assembly Bill A-2197. We are referring to Assembly Bill in this trial (p. 256) that was ultimately adopted of 1064.

A That's correct.

Q Were you aware the contents of both was substantially the same or the same?

A Yes. There was no question in our mind that the action taken by the delegates specifically referring to 2197 applied equally to 1064.

Q From what you read and heard, did you form an opinion as to what—apart from what the position of the School Board Association was, did you individually form an opinion as to what the purpose of this legislation was?

A I think at the time there were a number of states which had attempted to circumvent the Supreme Court action banning prayers in schools. I think that, with the activity of some proponents for restoring prayer in the school, that there was an obvious conclusion which I viewed that any intent to come up with a moment of silence or meditation was aimed at providing those students who wished to pray an opportunity to do so.

I think there was an attempt to do that in a way that the language of the state Bill would not violate the Supreme Court decision.

Q Do you think that providing an opportunity or a moment of silence for contemplation and introspection would have a probable result in that some students would use that (p. 257) opportunity for prayer?

A I'm sure they would.

Q As a professional educator, do you have a personal opinion as to whether the moment of silence has any substantial educational value?

A I would not see substantial educational value, no.

MR. ALTMAN: Your Honor I recognize the Court's concern with moving on, and I know that Dr. Newbaker—I make an offer of proof that Dr. Newbaker is in a position to testify to many of the facts and conclusions that have been presented by other experts heretofore, such as the effect on teachers, the peer pressures, the divisiveness factors, whether this would have any calming or transitional purpose, et cetera.

I'm a little bit sensitive to the Court wondering whether you think this might be cumulative on those points.

THE COURT: Certainly it would be cumulative. I can't control the presentation of your case unduly. I think we are beginning to duplicate quite considerably.

MR. ALTMAN: Being sensitive to that, and I think we have covered those points, I have no further questions.

THE COURT: Good. Cross-examination.

CROSS-EXAMINATION

BY MR. ROBERTSON:

(p. 258) Q Dr. Newbaker, referring back to the documents that I believe you have in front of you pertaining to the resolution that accompanied the June 31, 1981, and delegates convention. You have an internal memo attached to that resolution?

A I don't recognize an internal memo.

Q No doubt mischaracterized by me.

Oh, that's interesting.

Doctor, my copy—

MR. ALTMAN: May I see that? We don't have that.

Q It has two pages attached to the resolution. Yours apparently does not.

A I have one single sheet with what would have been two pages, including our background discussion and recommendation.

Q The solution is that you have a Xerox on the back side.

A Yes.

Q Good. I think you testified that there was no educational value to 2197, is that correct?

A Well, I believe I said no sustantial educational background value.

Q Was it the position, or the New Jersey School Board Association, did they take an official position that there was no educational value?

A I can't believe that the action said that there was no educational value.

Q I direct your attention to the last paragraph of the (p. 259) discussion portion of the resolution. Would you read that to yourself?

My question: Does that paragraph refresh your recollection that even as to the legislation contained in 2197,

there were proponents in the communities that espoused or proposed this legislation as being helpful for the purpose of calming students and impairing an atmosphere of quiet and seriousness for the school day?

MR. ALTMAN: I think it's important to determine a time that this is supposedly being proposed.

MR. ROBERTSON: I will.

THE COURT: You can narrow it down later if you want.

A I think the sentence, as I read it, is that supposed secular purpose.

Q And where did that supposed secular purpose come from?

A I don't know, but I suspect that our staff had heard those references. But the fact that we used the language, the supposed secular service, cast a great deal of doubt as to the educational value.

And I think—if I may read into that my own conclusion, that this was attempting to justify an educational purpose for what was more clearly an intent to pass legislation for restoring prayer to the schools.

Q Did you say that in that memo?

(p. 260) A As I read it with the background that I have, it has that meaning to me.

Q Did you say it in the memo?

MR. ALTMAN: Objection. Argumentative.

MR. ROBERTSON: Excuse me.

THE COURT: I'll permit it. The answer seems rather obvious.

A I should answer?

THE COURT: Yes.

A The sentence says the supposed purpose is to calm students down and impart an atmosphere of quiet and seriousness to the school day.

This may be so, but it hardly seems like this type of program which is so important that it must be mandated statewide by the legislature.

Again, the paragraph goes on to say that there is no legislation needed for boards of education to take such action.

Q I'll pick up the quote.

"Even without this legislation, school districts across the state are free to adopt as a matter of local policy a period of silence for their schools provided it is intended and used only for the secular purpose stated above. There is no compelling need to mandate such a period in every school. The efficiacy and even the necessity to requiring such a period (p. 261) of silence is best determined at local level."

Accurate quote?

A Yes, sir.

Q Did you ever say there is no educational purpose in this legislation?

A We did not say that specifically.

Q Did you ever make a study to determine that there was no educational purpose in this legislation?

A Only insofar as our staff researched this matter.

Q Did you ever tell—

THE COURT: Let him finish.

MR. ROBERTSON: I'm sorry.

A We did not conduct any kind of formal study, at least the definition that I would require, a formal study.

Q You communicated this paragraph to your local school boards with one intention?

A With what intention is your question?

Q Yes, sir.

A With the intention of providing them with a recommendation with regard to this Bill, and also with regard to the resolution submitted by the Montvale board.

Q And with further advice that they should decide it for themselves?

A We said that it could be decided by themselves, and that is according to our School Board Association policy (p. 262) position is preferable.

Q Did any school boards adopt the moment of silence?

A I'm not aware of any.

Q Do you know of any school boards that had, prior to that resolution, adopted a moment of silence?

A I can't specifically cite any.

Q Doctor, isn't it fair to say that what your Association objected to was a state legislative mandate, period?

A We were opposed to the mandate, but more specifically, I think knowing the attitude of board members,

I would say the vast majority of board members agreed with the U.S. Supreme Court decision banning prayer from public schools.

Q But the power struggle between your Association and the legislature was also involved, was it not?

MR. ALTMAN: Objection. I didn't hear any testimony about a power struggle.

THE COURT: Let's find out.

A I'm not aware of a power struggle.

Our purpose is to represent our positions, and I think we have done that adequately in the past.

Q Right. And you did not want the legislature dictating to you or your delegates what should be done in the schools of New Jersey?

A I think there were two issues.

Q Well, fine.

(p. 263) THE COURT: Let him finish.

Q Please tell us the two issues.

A One would be we are always sensitive to the legislature mandating requirements to the local districts where they should have the prerogative to meet the constituency's need.

The other issue, I think, was a genuine concern for freedom of religion and separation of church and state.

Q So there were two issues. It was not a single issue resolution that we were dealing with here, is that correct?

A I think, if I read the resolution correctly, that the overriding concern of the Montvale Board of Education was the intent of A-2197 to establish prayer and silent meditation as a requirement in schools.

MR. ROBERTSON: No futher questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. ALTMAN:

Q Are you aware of any studies conducted by the New Jersey legislature as to the educational value of the proposed moment of silence?

A I'm not aware of any.

Q Are you aware of any testimony that occurred before the legislature by any educational experts or psychologists that the proposed legislation had educational value or disciplinary value?

(p. 264) A I'm not aware of any, and, in fact, I believe—I knew our Association and the teachers union and I believe other educational organizations opposed the bill.

MR. ALTMAN: Nothing further.

(Excerpts of Trial Testimony of Stanley L. Rosner)

MR. ROBERTSON: No recross.

THE COURT: All right. Thank you very much.

MR. ALTMAN: Dr. Newbaker, thank you.

(Witness excused.)

THE COURT: Call your next witness.

MR. ALTMAN: Dr. Rosner. I just need a minute to dig out from under the accumulation of paper here this morning.

THE COURT: Yes. We'll get him on the stand and sworn in.

THE CLERK: Step up there. Place your left hand on the Bible, raise your right hand.

STANLEY L. ROSNER, being first duly sworn, testifies as follows:

THE CLERK: State your full name.

THE WITNESS: Stanley L. Rosner, R-o-s-n-e-r.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. ALTMAN:

Q Dr. Rosner, would you tell us what your present position is?

* * *

(p. 268) Q So I take it that you instruct people that are going to work with children, and as you said, for child care. Do you teach psychologists to be?

A School psychologists, and I've also—I should indicate that I have taught at Loyola College in Baltimore, and I'm currently a visiting lecture at John's Hopkins University where I'm teaching courses in school psychology and learning disability.

Q You had occasion to examine what has been referred to as the Moment of Silence legislation?

A Yes, I have.

Q And at whose request were you asked to do that?

A At the request of Ms. McHugh from your office.

Q And did she explain to you the purpose that she wanted you to look at this statute for?

A Yes, she did.

Q What was that?

A To formulate an imperssion as to what this legislation would mean to youngsters with problems if it were to be enacted.

Q And have you reached an opinion as to the effect of the Moment of Silence legislation, were it to be enacted in the public schools, on a handicapped child?

(p. 269) A Yes, I have.

Q Would you tell us what that opinion is?

A If I may be permitted to make both a general and specific answer.

The general answer is that I think for handicapped youngsters the imposition of the moment of silence would represent an area in which they would have additional difficulty above and beyond the problems that they already bring to the school situation.

I arrived at that conclusion by attempting to come up with some generalizations about handicapped children, because in that category we are talking about a broad range of youngsters.

There are youngsters who are under the general label of being retarded, or intellectually deficient. There are youngsters who are under the general label of learning disabled. There are youngsters who are under the label of being socially or emotionally disturbed.

To attempt to come up with some understanding of all three categories I've put together what I think is a reasonable generalization as to the kinds of problems that those youngsters have that would interact with their being required to maintain a moment of silence.

They have problems in five major areas. The first problem, which has generally been noted both in the (p. 270) literature and in clinical practice, are problems with per-

ception. One of the most common perceptual problems that youngsters with learning and other kinds of difficulties have is the perception and regulation of time. That is, they tend not always to be able to put in order on when lunchtime comes, when dinnertime comes, how long an hour is, let alone how long a moment is.

So that if they were asked to maintain a moment of silence, for many youngsters with difficulty, that would be something that they would have problems with right from the start.

Q I take it that would create problems for the teacher as well, or whoever was supervising them?

A Well, the next several points point out the kinds of problems that it would create with a teacher.

Q Can I interrupt you for one second, and then I would like to continue what you're doing.

We seem to be assuming that these handicapped children are in the public school classrooms. Are they in a regular classroom?

A Well, I was—when I finished with this, I was going to move to the other reasons that I formulated the opinion that I did.

Q Go ahead with your reasons.

A The second problem that many of these youngsters have (p. 271) is with mobility. That is, by and large, they tend to have problems with maintaining adequate control over their behavior. The common term which is used to describe the problems that they have are hyperactivity.

If required to maintain a moment of silence with no direction to fill that moment, we very frequently find that

youngsters who are having problems get into hyperactive, unacceptable, unruly kinds of behavior, which would start off a day for them by putting them in opposition to what the teacher felt was appropriate classroom behavior.

The third area of difficulty that these youngsters experience is in terms of conceptual kinds of problems. It was my feeling, upon reading the law, that what it suggested this moment be filled with, that is, contemplation and introspection, was for many of these youngsters a rather high level construction, which I think they would have considerable difficulty dealing with.

So, rather than contemplating and introspecting, they would generally be reacting to internal stimulae to be impulsive or hyperactive, and as a result, again, come into opposition with a teacher.

The next area which I think is number 4, is the fact that by and large they have attention and concentration difficulties. They frequently have difficulty attending even to situations that have been structured to enable them to (p. 272) learn well. So, such an unstructured situation simply allows for greater wandering and would, in general, again, lead to their getting into behaviors which would put them in opposition to the teacher.

The last area, which is language development, is not one which I think specifically is weighed on by the legislation itself.

Now, the other area of thinking, which formulated my opinion about the fact that handicapped youngsters would have difficulty with the moment of silence, were that it would present a problem that there is both law and

regulations requiring that certain things be done for handicapped youngsters.

Q Law in New Jersey?

A Nationally, and so it holds for New Jersey as for all states.

One of the requirements is that all youngsters be provided with an appropriate education in the least restrictive setting. That is to say, that youngsters with problems are no longer contained in classrooms for just youngsters with problems. They are mainstreamed.

Frequently, being put into regular classrooms, which is what mainstreaming involves, is a burden for them in terms of holding their behavior together.

To introduce an additional exercise which would (p. 273) put stress on their ability to hold themselves together seemed to me to be an unnecessary kind of thing.

Secondly, the law requires that each handicapped youngster, or each youngster who is deemed to be exceptional, and put under the heading of special education, be provided with an individualized educational program. That is to say, a written document in which what the youngster requires is clearly and carefully spelled out step by step.

Most individualized educational programs involve some statements as to how to help the youngsters gain a greater sense of dealing with time, self-control and management within the classroom. So that while a moment of silence might be perfectly appropriate for one youngster at the beginning of the day, for many others it might not only be inappropriate, but it might be counterproductive to what the educational plan was formulated to produce.

Q Can you just elaborate on the effect of implementing this statute due to the interaction of the handicapped child with the nonhandicapped child in the public classroom?

A Okay. The issue of mainstreaming, which is becoming a very important one educationally as funding is reduced, puts youngsters with problems in regular classrooms to a greater degree than ever before.

They frequently continue to have the same kinds of difficulties that they have had in the special education (p. 274) setting. But for the most part, attempts are made to reintegrate them into the program in a way which is as careful and thoughtful as possible.

However, one of the things which they have difficulty with, as I indicated before, is maintaining control, staying on target, keeping from being distractable and impulsive and inattentive, and simply having a mechanical exercise at the beginning of each day which requires an empty moment of silence would, for many of these youngsters, as I indicated before, put them in a substance of being in conflict with what the teacher had requested.

Q Are handicapped children any more prone to teacher influence either direct or indircet than a nonhandicapped child?

A That would depend to a large degree on the kind of handicap that we are talking about. I think, in general, it can be stated that youngsters with problems, both intellectual and learning problems, frequently are anxious to please the teacher. Their anxiety to please the teacher is even more deeply felt than other children because of

their inability often to succeed in those areas which the teacher is expecting and which their parents are expecting.

The group of handicapped youngsters who would be most prone to being influenced by their teacher's behavior would probably be the youngsters toward the bottom of the (p. 275) intellectual range, that is, intellectually deficient or the so-called retarded population.

Q What about the interplay between the handicapped child and the nonhandicapped child in terms of peer influence?

A There again, I think that youngsters with problems in the school situation are—tend to be more likely to model from kids who they see as being more capable, more adequate, more successful, more achieving.

Q So I take it that if either a teacher or another nonhandicapped student were utilizing the moment of silence for prayer, the handicapped child might be more prone to follow his peer influence or teacher influence than another nonhandicapped child might?

A It would certainly provide handicapped youngsters with the opportunity to demonstrate to the teacher that they could do something which the teacher seemed to value.

MR. ALTMAN: I have no further questions of Dr. Rosner.

THE COURT: All right. Maybe we can finish up the cross before lunch.

(p. 276) CROSS-EXAMINATION

BY MR. ROBERTSON:

Q Doctor, I know you're reading from something. Have you prepared a report in connection with your testimony?

A No, just made some notes for myself so that I wouldn't leave out critical points.

Q Do you have copies of those reports, or were they provided—

A I just have the rough notes I made for myself.

Q Can I look at it for a second?

A Sure

MR. ROBERTSON: Judge, may I take lunch at this time to talk to Dr. Rosner? I haven't seen these notes.

THE COURT: Well, quickly talk to him now because I've got a schedule today that I have to keep.

MR. ROBERTSON: Fine.

Your Honor, if you don't mind, I would like to stand here to question him.

THE COURT: Sure.

Q You've listed here the areas that you have testified to on direct, perception, mobility, language, conceptual conduct?

A Underneath conceptual, the note that I have is concrete. That is, these youngsters tend to operate at a very concrete level which was one of my areas of concern in that what the law required was a rather abstract understanding of (p. 277) how to use that time.

Q Doctor, have you read the law?

A Yes.

Q Objectively, what does the law provide the child to do, objectively?

A To use that time for what's written here, a quiet and private contemplation or introspection.

Q Do you distinguish between objective and subjective?

A Sure.

Q Objectively, what does the law require the child to do?

A Be silent for a moment.

Q Can these children be silent for a moment?

A Some.

Q Is silence used to help them become accustomed to cognitive control?

A At times for some youngsters.

Q In other words, their ability to be appropriately silent is a drill that may be go through through with some youngsters?

A With some youngsters, yes.

Q Doctor, Mr. Altman asked you about the children's likelihood to imitate the conduct of peers.

A Yes.

Q I think your answer was that they who do in the mainstream context what they believed the teacher wanted them (p. 278) to do?

A Well, I understood the question to deal with the teacher, but the influence of peers would be a factor as well.

Q Is there anything about the moment of silence that would contribute to a greater immitation of peers?

A Simply the absence of other stimulae would, in general, lead to their attending to something around them. They have also been described as inattentive, and their attention tends to wander.

They would be more likely to attend to their surroundings at that point.

Q Would they imitate the behavior of their peers without the moment of silence?

A Quite likely in some instances, yes.

MR. ROBERTSON: No further questions.

THE COURT: All right. Any redirect?

MR. ALTMAN: No.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

THE COURT: You can take your break. Do you want to stop now or go for ten minutes with your next witness?

MR. ALTMAN: For how long?

THE COURT: Ten minutes.

MR. ALTMAN: We might as well stop.

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(Excerpts of Trial Testimony of Thomas C. Thompson)

Thompson - direct

(p. 356) So one of the things we identified in the process of doing this, from both of those groups of people, was the fact that kids did perceive that they could—say if something was bothering them, that they could, in fact, say something to the counselor or say something to the principal in the school.

So what we decided to do was, in fact, then go to the counselors in the schools and give them a series of areas in which the moment of silence was imbedded as an area of concern, and ask them to list the areas of concern which students brought up.

We also then went to the principals and not asking them to do the same thing, but interviewing them around the issues that had been brought to them from students about the moment of silence and their perception on it.

Q Doctor, after you collected all this data, I assume you analyzed it?

A Yes.

Q And did you reach any opinions about the effect of the moment of silence?

A We reached several opinions about the moment of silence.

Q Could you give us those, please?

A Basically, the moment of silence appeared to be an event which was perceived by students basically as a period of (p. 357) silence and nothing else. It was used by students in different fashions, but the perception of it was a 60-second period of silence.

There was no evidence in the observations that we made from the students that it was perceived as an experi-

ence which would in some way facilitate or inhibit any type of religious activity in the school. There was apparently no perception by the students as a religious activity of same.

We found that the moment of silence seemed to have an effect which we—was later confirmed to us by the students, having the ability to help as a transitional tool between coming out of the outside world, the playgrounds and so forth, and acting as a traditional bit of environment morning ritual in terms of quieting the students down, settling them down in transitioning in for the day.

Q Did you find anything else about it? Was there anything else that the data showed you?

A The majority of students, about—I think it breaks down to about 51 percent, approximately, liked the moment of silence and perceived it as a period of time in which they could be quiet, think about what's going to be happening during the day, think about things, reflect on things, settle down. This was pretty much the tenor of responses that we got.

Q What you're saying to me is you actually found out what

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(p. 363) Q And did you notice anything different about that Act?

A Yes. It indicates that it's a moment for contemplation or introspection, which tends to be what the majority of our students indicate that they use it for.

Q Do you have an opinion as to what the effect that Act would have here in New Jersey?

A I assume that it would be—the effect of the moment of silence itself?

Q Yes.

A That would probably be similar to what it is in New Mexico.

Q Why is that?

A Children are, developmentally, basically pretty similar.

Q Doctor, in your observations of both in person and videotape, did you find any data that would suggest that there was overt prayer or objective prayer being used?

A We never saw any examples. The most you can say is that someone might close their eyes. Someone can put their head on their desk.

Whether, in fact, those people were engaged in prayer or not, because obviously we are finding from our sample that many of the people sitting in the classroom quietly were apparently thinking, and they can do this with their eyes open on.

(p. 364) The only thing that you might say in a quasi sense, if somebody put their head on a desk or closed their eyes, that's the closest thing you would have to a religious act.

Whether putting your head down and closing your eyes is a religious act or not, I don't know certainly. Certainly there was no indication on the students' part—I mean, very few of them who even liked it responded that they prayed during the time. Only one of them did pray during that time.

Q Doctor, does your test, or study, I should say, show or uncover or was it designed to uncover anxiety or coercion?

A Well, if you define anxiety or coercion as things that make people feel bad or uncomfortable, one of the items that we put in there, which is also a difference between the junior high and high school interview as opposed to the elementary interview, which was to—let's see, how do we word that here—when you feel good in school, when do you feel most comfortable? When do you feel bad in school? When do you feel most uncomfortable?

To look at, in terms of areas of anxiety, because typically if you ask students, are you anxious, especially in lower grades, you're not going to get much. Even in junior high when you ask people, do you feel bad at a certain time, or are you uncomfortable at a certain time—and we found

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Cross Examination—Thompson

(p. 395) A If you look at the issue of morality—

Q Can you answer my question directly?

THE COURT: Let him answer his way.

A First, there is no other empirical data with regard to the moment of silence. This is the study on the area of moment of silence.

Secondly, if you look at the issue of moral development of children and you look at the developmental literature,

one of them look at the fact that the basically moral development in children is pretty much similar cross-culturally in terms of research.

You don't find much advanced moral developments until you reach a higher age, and even at that point in time you tend not to see a really advanced moral development.

Q You don't believe, for example, that a child that comes from a home in Princeton where his father may be a chief executive of a corporation is going to view the moment of silence differently than a child that comes from a home in Appalachia and his primary concern is whether he eats in the morning.

A I don't know whether eating in the morning has an influence on the perception of moment of-silence, do you?

Q You're the expert. I don't profess to be the expert.

THE COURT: Gentlemen—please don't ask him questions. He can ask you questions.

* * *

(p. 404) A Yes.

Q Okay.

A That we were just limited—

Q What were those seven classrooms?

A Excuse me?

Q How many different schools did those seven classrooms—strike that.

How many different schools are there in Las Cruces?

A There are two high schools, I believe six junior highs, and I think there are 12 or 13 elementaries at that time. There may only have been five junior highs then.

Q So you had something like 20 schools and you had seven classrooms out of 20 schools?

A For the taping, yes.

Q You're not going to suggest those seven classrooms for taping were there for a representative sampling of all classrooms in the school system, are you?

A Yes, I would suggest that, yes.

Q How do you conclude that? You didn't even select the classrooms?

A I assume they were selected at random.

Q You assume it. I want to know what you know. On what basis do you assume it?

A I usually enter into a relationship with people that

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(p. 407) Q And you had two of those five geographical areas?

A Right.

Q And you don't know in fact with respect to those two schools what the socio-economic breakdown is within those schools?

A In fact, I know that the areas the schools draw from are mixed socio-economic level, including both barrios in our areas and also upper middle income areas, yes.

Q Did you make a study of that?

A It's very obvious. All you have to do is be in Las Cruces.

Q What about the other three that you didn't go in?

A What about them.

Q Are they mixed?

A No, they are not as mixed socio-economically.

Q They are not?

A No.

Q You didn't go in for them?

A No, not taping.

THE COURT: Mr. Altman, don't interrupt.

A We went into every school in Las Cruces.

Q For taping?

A No, no. For observation.

Q I'm only talking about taping. Do you understand that that's what we are questioning right now?

* * *

(p. 426) the data, look at all of the body of the data to see what questions we could or could not answer.

Q Okay. So once you had all this data, you would then have to look at it and bring your expertise to bear to make conclusions as to whether or not it was used for religious purposes?

A That's correct.

Q And could you tell me what religious academic training you have that gives you expertise in identifying what is religious activity?

A I don't know if I have any training to identify religious activity. I don't suspect it is really all that hard to identify, though.

Q Is that right?

A It seems so.

Q Do you know how an Orthodox Jew prays?

A No.

Q Do you know how a Shite Muslim prays?

A No, I do not.

Q Do you know whether there is any distinction among the Protestant denominations in terms of what is an acceptable form for prayer or not?

A In terms of acceptable form or human behavior associated with it?

Q An acceptable form for prayer. In other words, do you

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(p. 430) you didn't fence with me. There is nothing tricky or misleading.

THE COURT: Mr. Altman, I will do the instructing to the witness, not you.

If you have an objection, tell me.

MR. ALTMAN: I'm sorry, your Honor, yes.

THE COURT: Continue with your questions.

Q My question to you was, in fact, as much as 20 percent of the students in a given classroom bowed their heads in a manner that you interpreted as having a higher probability of being a religious act?

A Not that I interpreted. I said that could have a probability of being interpreted.

Q Doesn't it mean that you viewed it then as potentially a religious act?

A No. I simply said that it could be interpreted. That was the only behavior which could be.

Q Could be. Well, what made it possibly a religious act? Why did you conclude that it could be a religious act?

A Because probably bowing one's head and closing one's eyes is more religious than looking at the ceiling on a scale of one to ten.

Q That's the only reason?

A That's the only reason that I concluded.

Q That bowing one's head is more overtly a religious act

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(p. 445) Q One of the items was moment of silence, having a moment of silence?

A Correct.

Q And we commented on it, but the result of that question was that you determined that their attitude toward the moment of silence was basically neutral in terms of liking and disliking?

A Well, what we determined on the basis of the question, item number 13?

Q No, question 9. And 8 and 9 are, I guess, one question.

A Yes.

Q And you determined with regard to 13, number 13, having the moment of silence, that basically their attitude was natural in terms of whether they liked it or disliked it?

A Basically, what we looked for then is if the individual liked it, we inquired into what you liked about it, if you did not like it, what it is that you disliked. That's where we got the perception that about 50 some percent of the children, 51 percent, liked it and saw it as an activity which they were able to think and reflect.

Q About 37 percent said they hated it?

A I think it's actually 26 percent.

Q 26 percent said they hated it?

A They didn't say they hated it. They said they didn't (p. 446) like it. I don't think anybody hated it.

Q Some of them said, "It drives me crazy"?

A I think that appears you're talking about—yes, "It drives me crazy."

Q Doesn't that indicate anxiety?

A I don't think the individual meant it drove them crazy in the clinical sense. It was imbedded in the context of not liking to be quiet. It makes them feel very crazy to be quiet, I guess.

Q And feeling crazy isn't a feeling of anxiety?

A I don't know, or whether the individual simply wants to talk to their friends.

Q You had a second part of your questionnaire. For the benefit of the Judge, I have concluded all the questions that you asked in what you call the open-ended questions.

THE COURT: I can tell.

A You included them all in the open-ended.

Q You had a second set of questions, is that correct?

A No, basically the same questionnaire. Just it has a couple changes on it. In fact, I don't even know if it has the changes on it.

Q The second page here is basically the same question asked of junior high and high school students?

A Right.

Q You said the first part of the questionnaire was

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(p. 453) Q And it is your opinion that it will help focus a child from whatever was on his mind before the moment of silence to the school day. Is that essentially it?

A It was my observation and opinion that it seemed to do so, and that was confirmed by those individuals who responded in terms of why they liked it. They seeemed to also indicate that it was doing that in addition to the fact that also seemed to be the consensus with regard to teacher or principal's perception, especially at the elementary—some of the junior high level, although by the time you got into the later grades, there was less perception of it being a transitory tools.

Q Are you telling me what you perceived or others?

A The sources of my data also included the perceptions of others.

Q Do you have that data available?

A Probably it was written down. It may be available. It may not be available. I don't know.

Q I take it it's not here?

A No, it's not.

Q Well, in fact, you would recall that 47 percent of the teachers you interviewed were opposed to the moment of silence?

A I didn't interview any teachers.

Q That was part of the data communicated to you, wasn't

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(p. 458) in fact liked it seemed to use it in that fashion. That speaks for itself.

Whether or not it would be an effective tool to deal with children heavily anxious, I don't know. I doubt it, but I have no data.

Q Well, do you know that a child, for example, of young age can't even sit quietly for 60 seconds without considerable difficulty?

A In kindergaten age, it's very difficult. First grade is less. At the second grade it seems to be a very effective tool.

Q Wouldn't a child that finds difficulty in being silent for 60 seconds in the first grade, would that act in and of itself create anxiety for the child? I want to conform to the teacher's rules, the school rules?

A I don't know whether 60 seconds creates anxiety of having to be silent. I have no idea of that.

Q How about in the hyperactive child? He's told to sit silently for 60 seconds. Do you think he could do it?

A I would doubt it, if it's a child who is truly hyperactive, behavioral definition the child cannot sit still.

Q If he can't comply with his teacher's request, wouldn't that produce anxiety?

A I'm sure the child is so anxious anyway, that it would simply be one more source of anxiety, yes.

(p. 459) Q So it enhances anxiety.

How about the problem for the children—strike that.

Wouldn't that be a substantial problem for the teacher trying to enforce a hyperactive child to remain silent for 60 seconds?

A Sure.

Q You indicated you thought the results that you concluded—strike that—that the conclusion you draw from your study in Las Cruces, New Mexico would be equally applicable in New Jersey?

A Certainly they have a generalized ability because of the fact that we are dealing with children in a public school system. The public school systems are fairly well standardized in terms of education. Children develop mentally pretty much the same.

There are going to be other variables. If you want to find out exactly how, then you need to, in fact, do a very similar study here. Then you can replicate it.

Q Do you think the same holds true with regard to the children's perception of the moment of silence as a religious activity?

A It probably generalizes. If you want to know to the degree that it generalizes, of course, you would have to do the study.

(p. 460) Based upon the fact that the children are probably basically similar, since they are similar developmentally, biologically as organisms, yes, it probably does generalize.

Q Notwithstanding that 50 percent of the population of Las Cruces is Anglo, 50 percent is Hispanic?

A That's two groups. Certainly we know that they must be similar developmentally. Probably other racial groups are similar developmentally too.

Q You have to assume that with regard to how—whether or not a child would view the moment of silence as a religious activity, you have totally discounted their religious background?

A No. I do not feel it was important in terms of the perception of the moment of silence.

Q Nor the socio-economic background.

THE COURT: You're shaking your head meaning no?

A No. Yes. Sorry.

MR. ALTMAN: I have no further questions.

THE COURT: All right. This might be a good time then—

MR. MARINARI: I have no redirect.

THE COURT: All right. Then we can excuse you.

MR. MARINARI: Can we excuse the witness? He has to return on a midafternoon flight.

* * *

(p. 467) testimony before the Court today?

A Yes. Last spring I was asked by my superior, the superintendent of schools, Dr. Parnell, if I would meet with some lawyers who wanted to find out more about Sayreville, Sayreville's moment of silence.

Q And did you, in fact, meet with those lawyers?

A Yes, I did.

Q And do you know the names of those lawyers?

A Yes. I met with Mr. Marra and with yourself, Mr. Zoller.

Q How many occasions did you meet with us?

A Three times.

Q Mrs. Swenson, does the Sayreville school system utilize the moment of silence as part of its school activities?

A Yes.

Q How long have they been utilizing a moment of silence?

A I'm not up on the date, but I would say it must be 12 to 15 years that I have been doing it, and that it was required.

Q And do you, as a fifth grade teacher in that school system, observe a moment of silence in your classroom?

A Yes, I do, every day.

Q Do you know how it was that the moment of silence came to be introduced into the school system?

A The board of education passed a decision in this

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(p. 469) go about implementing the moment of silence in your classroom?

A Yes. At the point shortly after they have entered and taken care of routine matters, like putting books away or jackets away, and they are ready to start the school day, I call on them to stand and salute the flag. And after they have completed that, I ask them to sit and I ask them to close their eyes for our moment of silence. After a certain period of time, less than a minute, I would say, "All right, heads up, let's begin," something to that effect.

Q What is the reason for you instructing the students to close their eyes?

A Well, I teach fifth graders, and they are 10 going on 11. I thought that was the appropriate way to keep them from distracting one another so that they might have their moment of silence.

Q And could you give us specifically how long a period of silence it is that you observe in your classroom?

A Well, I would say probably most days it's 40 or 45 seconds. It's not a full minute.

Q What is it that you tell your students that they should be doing during this period of silence?

A I really don't tell them anything now because they have been observing it for so long. When it was started, I explained to my children the meaning of the word "meditation."

Q And what was the meaning that you explained to them?

(p. 470) A I said to them that meditation was private, serious thinking.

Q And what do you, as a teacher, do during this moment of silence?

A I supervise in the front of the room. I ask the children to close their eyes, but I do not close my eyes. I stand in a relaxed way and just observe the decorum of the classroom.

Q Do you have a view as to whether or not the moment of silence serves an educational purpose?

MR. ALTMAN: Objection. This witness was not identified as an expert witness.

MR. ZOLLER: She's not being offered as an expert witness.

MR. ALTMAN: She's offered as a fact witness. Her views would be as an expert.

THE COURT: I'll permit the question. Overruled.

Q You can answer the question.

A I think it's an appropriate, small formality that starts us off on the business of our school day, which is the children's learning.

Q And, by the way, is there any other times during the school day where you call for a moment of silence?

A Yes. Not calling it by that name, but I use silence as an occasional tool many times.

* * *

(p. 473) Q Have you ever seen a student doing something during this moment which you would consider to have a outwardly religious meaning to it?

A Yes.

Q By that what I mean is folding their hands possibly or blessing themselves?

A Yes. I've seen children folding their hands, but I've never really thought of that as a religious act. But I have seen children crossing themselves.

Q And when this occurred, did the students ask you for permission to do these things?

A No, they didn't. And could I add that only the child doing it was aware of it because the other children had their eyes closed.

Q So when this was done by one child, you didn't notice that other children did likewise?

A No, no. And it is very infrequent. I can only specifically remember once or twice in 12 to 15 years.

Q Once or twice that this situation has ever arisen?

A That's correct.

Q Do I understand your testimony that way?

A Yes.

Q Have you ever noticed that during this moment of silence that students have a tendency to become anxious or inattentive?

(p. 474) A No, they look very relaxed to me.

Q Have you experienced any control problems or discipline problems in implementing a moment of silence?

A No, very little. Less than many other moments of discipline.

Q Has any student of your ever requested to be excused from the classroom during the implementation of this moment of silence?

A No, they have not.

Q Mrs. Swenson, do you have occasion to meet with the parents of your students on a regular basis during the school year?

A Yes. We have conference periods, quite extended ones, twice a year. We have PTA meetings probably six or seven times a year. And whenever a parent calls or I think I should be in contact with them. That would come up.

Q So you would then make yourself available if a parent deemed necessary to speak to you?

A Oh, absolutely.

Q And would you say that parents do on occasion, in fact, call upon you?

A Oh, yes. In our school parents are in close contact with the school very often calling and asking to have me call them.

Q Have you ever experienced an occasion when a parent (p. 475) addressed any concern to you with regard to the implementation of the moment of silence?

A Never.

Q That covers the full gamut of 12 years that you referred to earlier?

A That's correct.

Q Has any parent ever questioned you with regard to the educational purpose or utility of the moment of silence?

A No.

Q Have you had occasion to speak with your fellow teachers during the school day or during the school year even?

A Yes.

Q And do you do so on a regular basis?

A Sure. I see them every day.

Q And have you had occasion to speak to them with regard to the moment of silence in particular?

A Yes. Within the past year, I'm sure that the conversation came up. I think I said I know it is in the handbook that we should have a moment of silence. I'm still doing it in my classroom. I don't know if everybody does.

The teachers who were present at the lunch table said, oh, yes, we still observe the moment of silence.

Q So, to the best of your knowledge, the moment of silence is in fact being implemented throughout the school?

A I believe so, yes.

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(p. 498) A My observations are very informal, sporadic. It may be walking down the hallway and stopping at a classroom door during the occasion when the teacher is conducting the opening exercise.

My sole purpose is to see the opening exercises are being conducted. If I'm there at the moment of silent meditation, I see children sitting at their seat silently. At the conclusion the teacher begins the school day.

Q Have you ever been advised by a teacher that a student has objected to the moment of silence?

A No.

Q Have you ever told your teachers or suggested to your teachers that the moment of silence is to be construed as a mandatory time for the allowance of prayer in the school?

A No.

Q Would you say that one of your functions as the principal of the school is to make yourself available to parents?

A Oh, yes.

Q And in what way do you make yourself available?

A Conferences, appointments. They are free to telephone me at any time when they have problems. PTA meetings.

Q On any occasion in the 14 years that you have been a principal, has any parent ever come to you and complained of the implementation of the moment of silence?

(p. 499) A Never.

Q Mr. Singer, do you have a view as to whether or not the moment of silence has an educational purpose?

MR. ALTMAN: Objection?

A Yes.

THE COURT: Overruled.

Did you say yes?

THE WITNESS: Yes.

Q Please tell us what your view is.

A It is a situation in which we can bring children into a controlled atmosphere from an out of school situation which is variable. It also gives them an opportunity to sit down briefly and reflect on their self-worth, on improving themselves and what they would like to accomplish during that school day.

Q Do you reside in Sayreville?

A Pardon me?

Q Do you live in Sayreville?

A Yes, I do.

Q How would you describe the ethical—the ethnic makeup of Sayreville, population?

A Mixed. I would say, for the most part, first or second generation Americans with central European ancestry, Scandinavian, Southern European, African, Asian, Hispanic.

Q Do you have black Americans residing in town?

* * *

(p. 505) Q Today?

A Right.

Q And you identified somebody there by the name of Mr. DiPoalo?

A Right.

Q And he is a member of the school board?

A Yes, he is.

Q My associate took a note. I want to know if you heard it said by Mr. DiPoalo. When he was guestioned by the reporter, he said, "People better do a little praying." Is that what he said? Did you hear that?

A That's what I heard him say.

Q What was he responding to when he said people better do a little praying?

A We don't advocate that. That was his version.

Q That was his version of how people should respond to the policy adopted by the school board?

A The policy adopted by the school board is a moment of silent meditation.

Q Is it your testimony then that you didn't understand what Mr. DiPoalo was referring to when he said, "People better do a little praying"?

A I'm sorry. Would you repeat that question?

Q Do you—

A I'm having difficulty hearing you because of the (p. 506) acoustics.

Q When Mr. DiPoalo said—the member of the school board said, quote, unquote, "People better do a little praying," what did you understand him to be referring to at the time he made that statement?

A That an individual can pray if he chooses to.

Q Well, doesn't "People better do a little praying" sound mandatory to you?

A I don't take it that way.

Q He was referring to the use of the moment of silence, was he not?

A I can't really say that's what he was doing.

Q Well, when this Bill—strike that.

When the policy was adopted in September of 1969, it provided for a two-minute period of meditation for any child who wants to pray, correct?

A I read that for the first time two days ago.

Q But that, indeed, was what the policy was?

A Right.

Q And in September of 1969, were you a principal?

A Yes, I was.

Q Incidentally, this very motion, the motion to adopt this policy of mandating two minutes of meditation to allow children to pray was moved by Mr. DiPoalo, was it not?

A According to that, yes.

(p. 507) Q Now, I assume this is the same Mr. DiPoalo that was on the film?

A The board of education, yes, that one.

Q And you indicate that in 1978 the Exhibit D-12, which is entitled, "Opening Exercises," was an amendment to the existing moment of silence?

A Actually, what that was was very shortly after we received the memo about the two-minute period of silent meditation, we did have one concern. The concern was two minutes is too long to have a period of silent meditation.

Q Very soon after?

A This concern came from teachers and principals. We met together and it was determined that we were not to worry about having it a full two minutes, but leave it up to the discretion of the classroom teacher as to how long it would be.

Very shortly after that policy was put out, the initial one—

Q The initial one?

A We had gone to a moment of silence meditation, which was much shorter than two minutes.

As I stated before, in 1978, all school districts were mandated to put their policies in writing and have them available to their personnel. That is the one that we had been following a lot longer than since 1978. But now it is in (p. 508) writing. That's why I said officially.

Q But as the Judge pointed out to you, this opening exercise, or this policy identified as opening exercise, know as policy number 808 says, "Opening exercises may

also include the singing of patriotic songs and a moment of silent meditation," correct?

A Correct.

Q Did anyone assist you in giving interpretation to that language?

A No one has questioned that.

Q Did you ask the superintendent what that meant?

A No, I had no reason to.

Q You concluded, however, that apparently you instructed your teachers that on the basis of that policy it should be viewed as mandatory rather than discretionary?

A Would you repeat that again, please?

Q You instructed your teachers on the basis of this policy that they must conduct a moment of silence in the morning?

A I never said they must conduct a moment of silence. Opening exercises consist of the salute to the flag, singing of a patriotic song and the moment of silence.

Q And you told them that—I take it then you told your teachers that those opening exercises should contain all three of those components. Mrs. Swenson indicated from time to (p. 509) time—

THE COURT: Excuse me. Was the answer yes?

THE WITNESS: Pardon me?

THE COURT: Was your answer yes to that question? Did the opening exercises, they must contain all three of those components?

THE WITNESS: Not must contain, I'm sorry. They may contain all three. They can contain all three.

Some teachers choose not to have a patriotic song.

Q Do some teachers choose not to have a moment of silence?

A No.

Q Are they permitted to choose not to have a moment of silence?

A Pardon me?

Q Do you permit them to choose not to have a moment of silence?

A No.

Q So you mandate the moment of silence. You, personally.

Particularly new teachers when they come in for instruction at the beginning of the year?

A When a school teacher came for instruction, I would tell her what the opening exercises consist of. If they choose not to it according to that policy, they wouldn't (p. 510) have to do it. But I have never had that situation arise.

Q Okay. I'm not talking about whether it happened or didn't happen.

Taking this policy then, you're now saying that you would interpret D-12 to be that if a teacher did not want to have the moment of silence in her classroom, you would allow her to exercise her discretion not to conduct the moment of silence?

A According to that policy, I probably could.

Q Were you present at the meeting of the board of education for Sayreville when they adopted this policy?

A No.

Q Did you ever testify before them or—

A I never attended a board meeting.

Q I take it you had no input into changing this policy from the previous policy, or you don't know exactly what their thought processes were?

A No.

Q All right. Never mind. I'll withdraw the question.

Do I understand that when the policy in '69 was adopted to have two minutes of meditation to allow a child to pray, that the only way in which that policy was communicated to you was by the superintendent calling you up?

A No. The superintendent sent us a directive in writing informing us—

(p. 511) Q And this was it?

A That was not the directive.

Q Yesteday when you were preparing your testimony or gathering information in anticipation of this appearance, did you attempt to look up that directive?

A No. That would have been a memo. I wouldn't have that in my possession anymore.

Q You wouldn't keep it?

A That's 14 years ago.

Q Did this come from your school, or did it come from the board of education? Do you know?

A That was requested from the board of education secretary by Miss McHugh. It was also requested of me by Mr. Zoller.

Q And the board forwarded it to you?

A Exactly. This is why two days ago was the first time I saw that document.

Q So then you have no written record of what the superintendent said to you about the implementation of the moment of silence some 14 years ago?

A Other than the receipt of the memo that informed us that we were to implement that into our opening exercises.

Q I'm saying, you don't have that memo?

A I do not. I'm just remembering that this is the procedure.

(p. 512) Q You're basing it on recollection from 14 years ago?

A Right.

Q No, I take it that if a teacher wished to adopt a prayerful posture in her class or actually pray silently during the two-minute moment of silence, you would indicate to them that that was permissible?

A Contrary to the way I may feel personally about that, I'm afraid I would have to go to that teacher and tell her that she's not to do that.

Q That she's not to do that?

A Yes, right.

Q She couldn't even—not each silently?

A During the moment of silence.

Q Then is it your interpretation that the two minute moment of silence cannot be utilized by a teacher for prayer?

A What I'm saying here that if a teacher chooses to use it that way, and does it in such a way where it is not visible, or can be interpreted by anybody watching her that she is doing it, I wouldn't know that it's going on. But if there is any physical act or anything like that where she is doing something that's gong to indicate that she's praying, and you can see it and you can tell it, then I am bound to tell her that's not the purpose of a silent moment, a momen. f silence.

Q Well, where did you derive your impression as to what (p. 513) this moment of silence would permit or not permit? The original one said it was for the express purpose of allowing prayer. This one doesn't say prayer or not prayer.

How did you conclude that prayer would be inappropriate for a teacher during this period?

A We have been using this moment of silence for 14 years. Over the 14 years, for the past five or six years in our school, what we think of it as a moment of silence.

No advocation of prayer or anything.

Q But from what did you derive your authority or the opinion that you would tell a teacher that she could not display any overt or outward signs of prayer?

A I would have to tell her that, yes.

Q I understand that you would—you said you would tell her that. But why would you tell her that? That's what I'm asking you.

A For the mere fact that perhaps because of the age of the children that she is responsible for, it may leave an impression on them.

Q What kind of impression?

A They may copy her actions.

Q I take it a child, however, you would permit to pray and make manifest signs of prayer?

A I would. I would be very hesitant to go up to a child and tell him he's doing something incorrectly.

(p. 514) Q Do you agree with Mrs. Swenson's interpretation, or is it your interpretation of the moment of silence that students are required to remain quiet, first of all, that they have to be quiet?

A Right.

Q That they would be seated?

A Yes.

Q Eyes closed?

A Yes.

Q Is that yes to be seated, or yes to eyes closed or both?

A Repeat the question again.

Q Okay. I think we got past—they would have to be quiet. And I ask you if they would have to be seated?

A Yes.

Q And eyes closed?

A Yes.

Q Now, what is there in this policy that requires the children close their eyes. What is there from the board of education, the board of education who adopted a policy in D-12 that you're enforcing that requires the children to close their eyes?

A Nothing. But I see no harm, really, in their closing their eyes, except that perhaps when they close their eyes they are not going to see what each other is doing during a (p. 515) moment of silent meditation.

Q So that you have individually mandated that they close their eyes?

A No. The teachers in my building have the right to go ahead and institute the moment of silent meditation as per their procedures.

Mrs. Swenson chose this method. It works.

A first grade teacher may ask her children to just put their heads down on the desk and think about what they would like to do during the day for a few brief moments.

A kindergarten teacher may introduce it the same way.

A sixth grade teacher may require that her class remain standing for a few seconds right after the singing of the patriotic song and ask them to sit down.

There basically is no standard procedure as to how it must be done is.

Q I see. So a period of time is not mandated in your school?

A No. As I stated before, the two minutes that was mandated at the beginning of this—at the beginning of the moment of silence, in 1969, we felt was too long.

We also don't have stop watches where we can say, here, you start now, and two minutes later say, everybody stop.

(p. 516) So we were given permission to leave it up to the discretion of the classroom teacher as to how long it should be. It ranges anywhere from, say, five seconds to 45 seconds.

Q You told Judge Debevoise that you thought the principal change or amendment that was achieved by number 808 was to reflect that the moment of silence had been reduced from two minutes to a lesser period of time as you just stated?

A Officially. Because we have been doing it way before that.

Q Okay. I understand that.

And I take it then that you didn't think there was any principal change in the operation of moment of silence other than that?

A No, not really.

Q So although the first moment of silence expressly stated that the two minutes of meditation should be used

in the morning for any child who wants to pray, you nevertheless concluded that D-12 did not reflect a change of policy in that regard?

A What I'm saying was that the original memo that we received in 1969 made no reference whatsoever as to us giving the child an opportunity to pray. It just gave us the information that the board of education adopted a resolution to provide for 'wo minutes of silent meditation.

Q Did a teacher ever ask you—strike that.

(p. 517) How long have you been in—you've been the principal of the same school since 1969?

A I've been in education for 29 years in the district.

Q Have you been at this particular school since the original policy was adopted?

A Since 1969?

Q Yes.

A I started in 1955.

Q There at the same school?

A Right, in the same district, not the same school.

Q And is it your testimony that there has been never any discussion between you as principal and teachers as to whether the moment of silence should be used for prayer?

A No, because we knew it couldn't be used for prayer. It wasn't supposed to be used for prayer.

I never had that document in my possession.

Q So your interpretation at the moment of silence, as you just stated, is that it could not be used for prayer?

A Silent meditation. Do not advocate prayer.

Q Did you ever tell that to any of the teachers, any of the new teachers when they came in?

A Do not advocate prayer.

Q Not to use it for prayer?

A Exactly.

Q Did you instruct them as to how they should respond to (p. 518) students if students asked them if they could use that opportunity for prayer?

A Yes.

Q And I take it that they were told that they could tell the children, yes, they can pray?

A The child may do whatever he wishes.

Q You said that—just a couple more questions for you—that you perceived the moment of silence as having a beneficial effect in creating a controlled atmosphere. Don't you have a controlled atmosphere in effect as the—once you commence that opening exercise when the teacher tells the students to rise and to do the Pledge of Allegiance?

A Yes. Perhaps I should have worded that as just a continuation as a beginning for the control of the class. The children are coming in from a playground. Some of them are coming in from different home environment. They are coming into a classroom procedure where they will all be together for the remainder of the day.

The moment of silence is an opportunity for them to sit quietly, stand quietly and reflect on what they expect to achieve during that school day.

Q Of course, before they begin to reflect on what they are going to do the rest of the day, the teacher has brought them to attention. They are standing. I presume the Pledge of Allegiance is conducted in quiet. The teacher leads the (p. 519) exercise. People verbally say the Pledge of Allegiance, face the flag, maybe go through the ritual of putting their hand to their heart, the children, correct?

A. Correct.

Q I assume it is not a time for rowdiness or for misbehavior?

A Correct.

Q Then there may be a patriotic song?

A Correct.

Q And this may have lasted several minutes now?

A And it's always a good idea to have a few moments of silence before you go into the day. I believe in that.

Q Did you do that before the—did you have a few minutes of silence at the time—strike that.

I take—I assume you were a teacher in the school system and an administrator when it was common practice for the children to have the Lord's Prayer?

A Before this was implemented?

Q Yes. Do you remember a time when it was common practice in every school—

A I remember I was teaching in the school room when we had to read a selection from the Old Testament. We had to repeat the Lord's Prayer, salute the flag and sing the National Anthem.

Q And when they completed that, did you require your (p. 520) students to have an additional minute or two of silence?

A I can't recall exactly, but I'm sure there were moments when I did ask the children to sit down and be quiet.

Q Moments during the day when you thought silence would be appropriate?

A There were moments during the day when I had to ask them to be silent also.

Q I assume it wasn't structured or regimented where you told them to be silent at the same time every day?

A Pardon me?

Q That's all right. I'll withdraw the last question.

You said that you would like to see the children use the moment of silence to reflect on what they wished to accomplish during the school day. Have you ever promulgated a memorandum to your teachers that they should tell the children that they should use this moment of silence to reflect on what—reflect on themselves and about what they think of themselves and what they would like to do with their school day or achieve in their school day?

A No. I don't believe I ever issued a memorandum. That may have been discussed at a faculty meeting.

Q So a —

A That's one of the things they could do.

Q So I assume the children are left to their own devices to conclude that as as you have, that that would be a proper (p. 521) utilization for the moment of silence?

A One of them, right.

MR. ALTMAN: No further questions.

THE COURT: Any redirect?

MR. ZOLLER: No redirect.

THE COURT: Thank you, Mr. Singer. Good. (Witness excused.)

THE COURT: What is your schedule now?

MR. ROBERTSON: I have an expert witness, your Honor.

THE COURT: Will he be lengthy?

MR. ROBERTSON: I'm going to try to compress it. I think that I can do that, and I would like to get him finished today because we have another expert tomorrow morning. We can take our afternoon recess—

THE COURT: I would just as soon go right through because I have another matter that I have to hear.

MR. ROBERTSON: Fine.

THE CLERK: Place your left hand on the Bible, raise your right hand.

ADAM SCRUPSKI, being first duly sworn, testifies as follows:

THE CLERK: State your full name.

THE WITNESS: Adam Scrupski. S-c-r-u-p-s-k-i.

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(p. 532) were able to gather from your research?

MR. ALTMAN: I object. The testimony to the extent that it contains data that he might abstract from it and utilize, I suppose if we laid a proper foundation, he could be asked about it.

But his testimony, in general, is consistent with his theoretical approach, is not in my mind a proper question.

THE COURT: I'm going to sustain the objection perhaps on other grounds.

I don't know that I can define in a precise way Mr. Singer and Dr. Thompson. It seems to me there were a number of conclusions which could be drawn from each. I think it is a little broad to have a broad, general question as to whether his approach is consistent with theirs.

MR. ROBERTSON: I'll refine the question.

THE COURT: Why don't you just get what his conclusions were?

Q Doctor, before I ask you—I'll ask you the question.

As a result of your research and review of the literature, have you formed an opinion as to the pedagogical functions that a moment of silence can perform?

A I think it has implications for the pedagogical function of the school, of a beneficial sort.

Q Can you explain carefully and as completely as—

A It seems to me that the moment of silence as a, shall (p. 533) we say, a supplement, if you will, to morn-

ing exercises, or as a form of opening exercise constitutes a boundary between the world of not school and that of school.

Assisting in the defintion of the school situation as one demanding of and involving more serious, concerted effort than is the case in peer group relationships, familial relationships and other social context in which even children engage.

Q How would the moment function to establish this boundary?

A The connotation of silence in our society, and I believe other societies and cultures as well, seems to be one of seriousness and solemnity.

The social context in which silence tends to be in order include courtrooms, libraries, hospitals, battle monuments, places of worship.

Silence then is associated with seriousness. Including a moment of silence at the outset of the school day, then, tends to define the school situation as one of seriousness. Where there might be a blurring of the demands of the school situation or the definition of the school situation, and the social context and normative patterns and expected behavior of peer group, the relaxed demands, let us say, and expectations of family, the moment of silence seems to me can successfully prevent the diffusion of such (p. 534) orientations, such normative patterns on the classroom, and support then the definition of the classroom as a place where serious academic work goes on under the direction of a teacher.

In a sense, it seems to me that the idea of teacher role, the rights and obligations of the teacher, vis-a-vis students, the possibility of exerting rigorous demands on the student, is in that sense associated with the definition of the situation, that is, as Willard Wohler said, "The role sticks to the situation as the answer sticks on the question."

Q Who is Willard Wohler?

A A sociologist of education, whose book written in 1932 is considered a—I suppose you have to use that—a classic. But it's still an extremely valuable collection of insights with respect to the structure of the school and teachers and student relationship.

Q Professor Scrupski, how would you characterize the moment of silence from an analytical standpoint?

MR. ALTMAN: I don't know what that means.

A I'm not sure either.

Q I'll rephrase it.

What role does the moment of silence serve? You talked about boundaries. How does it serve to create boundaries?

(p. 535) A As a repeated ritual, as a kind of resocialization phenomenon, or socialization phenomenon. It defines the situation.

Q Could you describe what you mean by a ritual?

A A ritual is an act repeated regularly in similar fashion in terms of similar stimulae.

Q Doctor, why wouldn't prayer serve the same function?

A A particular prayer?

Q Yes, sir.

A A particular prayer would be offensive to the variety of student personnel that constitute the school's clientele.

Q Were you a teacher when the practice was to recite a prayer in the schools?

A That's right. I taught from 1954 through 1959 when the opening exercises were as they were just described a few minutes ago, a verse of the Old Testament without comment plus the Lord's Prayer.

Q Have you had occasion to focus on the utility of prayer as this ritual that you speak of?

A Prayer—prayer served, it seemed to me, as a traditional form of ritual, a similar function. It probably serves a similar function traditionally in other institutions in our society.

Educationally, however, the nature of education, the nature of the school, its influence on children, it seems

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(p. 542) boring, and even a weekend indication of participation in clubs and extracurricular activities, which might indicate an embracement of the activity and a kind of extra, or even significant educational experience.

Q How, in your opinion, would the moment of silence perhaps serve to reverse that trend?

A Only by daily—only by daily connoting the classroom as a place where serious business takes place, more serious than that which takes place on the playground, in the corridor, in shopping malls and so on.

Q Professor, are you familiar with the practice of the flag salute in the American classroom?

A I understand it's part of New Jersey state school law still, as far as I know, to have the flag salute.

Q Why couldn't that serve to establish the boundary?

A It's hard to say, but I'm unconscious in my observations, and I'm sorry, I can't reflect on my observations of the particular school, of a certain weakening. This can be derived from other theorists and observers of those centrally administered, centrally located, allegiance in a differentiated society such as the United States is coming to be, including the flag as a symbol.

It seems to me the flag is not functioning as effectively as it used to be as a collection point for the allegiance of students and as an affiliation, in a sense, as (p. 543) signifying a kind of affiliation with the public educational scheme, as I think it used to, at least to people who went to school earlier suggested.

It doesn't mean it can't still be used and that it might not come again to occupy its former status.

MR. ROBERTSON: Judge, if I can have a moment?

THE COURT: Sure.

(Pause.)

MR. ROBERTSON: Judge, I have no further questions.

THE COURT: All right, cross-examine.

CROSS-EXAMINATION

BY MR. ALTMAN:

Q Professor, you indicated that the first time the moment of silence was proposed or in existence at the time came to your intention was through a friend making some inquiry of you, is that correct?

A That's right.

Q Do you recall whether that was?

A I think it was sometime early last spring.

Q So that would be the spring of 1983 you're referring to?

A 1983. I could be wrong on the date.

Q Was it your impression that when this friend approached you, the time was subsequent to the enactment of this law?

(p. 544) A Yes.

Q And I take it also that were you aware that it was also subsequent to a challenge to the enactment of this law?

A I believe I was aware that the law had been, what would you say, enjoined?

Q Yes.

A Prevented from taking effect. I think I knew that at the time.

Q And you said something about this friend being a representative of a state legislator or the state Legislature?

A He had an occupational position associated with the committee, I think, on education. He happened to be, though, a good friend. He happens to be a neighbor of mine in Hightstown. He was a neighbor of mine in Middlesex County when my foot—I happened to have a couple of toes amputated and I couldn't walk. He drove me back and forth to Rutgers. We have had a long, close relationship.

In the process of talking with him, he happened to ask me.

Q You seem to be somewhat concerned that maybe there was something wrong?

A The implication is that there is—something underhanded about this.

Q No, don't worry about that. That is not the implication at all.

(p. 545) Who is this person that you're referring to? There is nothing wrong with him talking to you?

A John White.

Q Is he a staff person to a legislative committee?

A Uh-hum.

Q Okay. Do you know whether it was the Assembly Education Committee or the Senate Education Committee?

A I don't know. I thought there was a joint committee.

Q They may at times sit as a joint committee. But they are separate. That's okay.

Was he a member of that staff prior to the enactment of the legislation?

A I believe so, yes.

Q Did he ever discuss that proposed legislation with you prior to its enactment?

A No. I didn't see him for awhile. John's relationship and mine has been off and on, off and on.

Q So, the first time that he asked you if there might be a secular purpose for this law, was after the law had been adopted and enjoined?

A Yes.

Q So I take it that he was seeking you out to find out if there could be some legitimate secular—strike legitimate—some secular justification presented for, or in defense of this particular law?

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(p. 561) moment of silence has nothing to do with this diminishing of clarity that you say has occurred over time, is that correct?

A Yes.

Q And, therefore, what I'm really trying to understand from you—I understand you're saying that one moment of silence in your mind might have some value. But there would be many other ways that might be better employed to achieve clarity of purpose for students in the educational process, wouldn't there?

A I think that we have to be—a concerted effort made by school personnel and supportive personnel to clarify roles, yes.

What I'm suggesting, however, is that a moment of silence can assist in this. It would be a step in the right direction.

Q Okay But you're not putting some—you're not in any way attempting to quantify the amount of value this would have?

A No.

Q In fact, one thing that might be a lot more helpful would be identifying what actually is the cause of a particular student's lack of clarity and trying to eliminate that cause.

A When you talk about a particular student, you're dealing with the psychologist's domain. We are speaking of

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(p. 603) newspapers in dissemination of this information?

A The conclusion really was that we needed a multiple approach of sources to reach children; that we couldn't rely on newspapers as a primary source if we want to get information to them about X issue.

Q Professor Aumente, have you reviewed the collection of newspaper articles that has been admitted as plaintiffs exhibits?

A Yes, I have.

Q Have you drawn any professional conclusions as to the utility of those articles in determining or measuring public perception?

A Yes. I think that they are an interesting batch or —of a piece of information. But I think within the context of my interest and what I was asked to look at within this case, it is only a blip on a screen. It is a very small fragment of what is out there.

I'm only talking about—this is not an exhaustive study of newspapers that we were talking about before in the state of New Jersey or that reach the state of New Jersey. I would probably give you the same answer, and that is, it is only one fragment. It is not the whole array of mass media that, in fact, is reaching the people.

Then I can talk more specifically about the articles I looked at, the 62 articles. But it is a fragmented (p. 604) piece.

Q Professor Aumente, can you tell me how many print sources are represented by plaintiffs exhibits?

A I have a little problem with this in that I was getting this in waves, and, also, finding that when I did the list, I found several articles that were repeated in the list of 57 articles that were there originally. Total items I worked with—I counted 57 and 5, the 5 being given to me on Wednesday. So that I'm using 62 as my universe, a pretty small universe, but that's what I had to work with.

Q Can you tell me how many print sources are represented by those 62?

A Well, they are all print. The breakout of the 62?

Q How many newspapers?

A Oh, I'm sorry. I count 11 newspapers. Other than the Philadelphia Inquirer and the New York Times, all New Jersey based. So we are talking about 11 papers, two out of state, nine state papers.

Q And that is in comparison to how many print sources, how many newspaper sources in New Jersey?

A We are talking about 33 or 34 dailies, 33 or 34 Sunday papers. We are talking about at least 300 weekly papers, plus the papers on both sides of the river. This is 11 papers out of—I haven't done the total, but four, 500 at least.

Q Professor Aumente, have you had a chance to review the

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(p. 613) the elements of that story?

These involve a whole range of measures. They involve the—is it a byline story? Is it a prominent story on the front page, or one of the break pages? Is it a multiple column story? Is it a photograph story, a wire story? These things carry different values.

Then you have to talk about the contents of the story itself in terms of way the lead is focusing the whole story. You get into the body of it.

In order for me to tell you how someone perceives something, I have to know this because I even start asking them how they perceive it. The next thing is that I cannot take this batch of material and whatever it is, whether it is videotapes or paper, paper sources, and say, okay, this stuff came into the state of New Jersey. Therefore, the people in the state of New Jersey have been absorbing it.

You do need some kind of a polling concept, a question concept, one-to-one observation with human being to human being to decide exactly how much of this they use. There are a variety of survey methods to do this.

There are things called focus groups that have been most effective in the past, and that is to take a group of readers and let them sit down and carefully read a paper, and then to be questioned on what they read in that paper and what they valued and to read the context of it. It is very (p. 614) artificial to take a batch of clippings—we don't live like this, I, for one, don't—in the space of 1982 and 1983, travel up and down throughout New Jersey grabbing these clippings and then incorporating them into my perception.

I'm only in one part of the state and I only read a certain kind of paper. So it is important to have this kind of focus group discussing it. This is what we have read and this is how it affects us.

There are also—there is the problem of what people think they read or think they saw versus what they actually do. Sometimes if you call someone up and ask them to say, have you read this or not, that's a good indicator, but you may have to go beyond that and actually probe into that in terms of the depth of knowledge on something.

Again, I apologize for the long-windedness of this, but it's basically breaking to the point of at least being able to ask the right questions.

Getting back to your question. How do we measure, you know, how people, in fact, would perceive the issue based on this kind of exposure, we are just coming up to that point of, okay, we have this whole content identified. We then are starting to do the opinion polling and everything else to get a better sense of it. But it is that kind of process, unless you want to do a quick and dirty, and you'll get the results of a quick and dirty if you do that.

(p. 615) Q Professor Aumente, during the course of your scholarship, have you become familiar with studies of mass media impact on behavior?

A Yes.

Q Assume for the purposes of this question that we do know what the public perception is by whatever accurate means are available to measure it. Would such a finding permit one to predict people's subsequent behavior?

A No.

Q Can you explain that?

A If I quantified what was available in the media and then took the next step of establishing with some degree of accuracy who uses the media and how, that still does not tell me how behavior is affected in the sense of are values made or changed or are attitudes made or changed? It is another level of observation or research that has to be done.

Q How would such research be done?

A There are a variety of methods. They are within the media field, within the media effects field.

There is a history of analyzing the mass media effects that go back to 1910. If we took a time line on them, 1910 to 1983, you would find that this variance, from 1910 to 1940 there was a school of thought that said the mass media had a tremendous impact on attitude and value. And this was the so-called bullet or hypodermic theory, and that is, you (p. 616) give the mass media—you give someone a jolt of mass media and you immediately start acting differently and behaving differently.

A lot of this came out of the studies that were done of propaganda, propaganda analysis after World War I.

Then in the '50s and '60s there was a shift away within the communication theory field where other studies were done in terms of impact of mass media.

As they start dong analysis of things like the impact on elections, the media impact on elections, finding that there was a divergence between the degree of impact, degree of media exposure and the actual impact or the

change of behavior. Then there was a shift towards a real downward sense of where the media was affecting.

It seems to be climbing back up again since the 1970s and 1980s, some of the studies done on violence on television. So we are at a point now where basically if you're looking at the field, the field probably would have mixed opinions, would be five to six opinions as to how important the mass media are.

We would probably be saying that you have to look at the total culture. Gerber is a good example, who basically says you have to not look only at the message, but the context of the society and the elements taking place within it.

These kinds of activities are now at play. If I

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(p. 647) do you on occasion go to Trenton?

A Yes. I have an office in Trenton and I go regularly to Trenton.

Q Do you follow issues of public concern or interest to your constituents?

A Yes, I do.

Q In that regard did you follow Assembly Bill 1064?

A Oh, yes.

Q In what capacity did you follow it? Did you appear at—give testimony or anything like that?

A I didn't testify on this particular bill. What I did primarily for this case, was my observation of both the Assembly and Senate override sessions after the Governor's veto.

Q Did you appear at any committees?

A Not on this Bill.

Q But you did appear at the veto override?

A Yes, I did.

Q Do you remember what date that was?

A I made some notes on December 16th, the day the Senate overrode the veto. I dated the note so I can be sure of that.

Q That was December 16, 1982?

A That's true.

MS. McHUGH: Judge, I would like to have this marked as an exhibit.

(p. 648) THE COURT: What is the number?

MS. McHUGH: I think it's 80, Judge.

THE COURT: All right, P-80.

(Exhibit marked P-80 for identification.)

Q Reverend Sarfaty, you indicated that you followed Assembly Bill 1064, and that you appeared at the Legislature on the veto override, is that correct?

A That's true.

Q And can you tell me on the occasions when you were present there in the Senate or the Assembly on the veto override, whether or not there were any views expressed by Assemblyman Adubato?

A Yes, Senator Adubato, dealing with the issue of the state and religion, thought it would be a good thing if the state would subsidize parochial education, and that this Bill was a good step in that direction.

Q Were those remarks made on the floor?

A They were made on the floor for everybody to hear. I know Assemblyman Adubato's voice. His seat is under the balcony. I didn't see his face, but I know his voice.

Q How about Senator Dumont? Did he make any remarks? And if so, what were those remarks?

A Senator Dumont—

Q Excuse me, Reverend. Are you looking at some notes?

A Yes. I'm looking at the notes that I made on that (p. 649) occasion.

Q Are those the notes that we have had marked as Plaintiffs' Exhibit 80? Let me show you this exhibit.

A Yes. You have the original and I have a photocopy.

Q Reverend Sarfaty, can you testify from recollection, or do you have to rely upon those notes in order to give your testimony?

A Oh, I rely on the notes for specific wording, but I do remember the positions that struck me enough to write down what they were saying.

Q Could you then tell us—if you have to rely upon your notes, go ahead—what Senator Dumont said, if he said anything with respect to Assembly Bill 1064?

A He was for override. But the specific thing that impressed me was that he thought this kind of ceremony in school would cut down crime and disruption, which he was against. He suggested, which was of interest to me, that the Senate, in considering the override, shouldn't be rigid on matters of church and state.

Q Did he elaborate on that point or not?

A He made a comment about aid to private schools. Apparently it didn't disturb him as much as it would have disturbed us. That was all that I recall his saying.

THE COURT: Cut down crime and what?

THE WITNESS: He said it would cut down crime and (p. 650) disruption.

Q You've indicated, Reverend, that it didn't apparently disturb Senator Dumont as it would have disturbed you. What do you mean by that?

A We have a position on the separation of church and state that we take from a religious perspective; we also understand to be the policy of our government as interpreted by the developing doctrine in the Supreme Court.

Senator Dumont wasn't quite as concerned about mixing up church and state, religious and secular practices as we are.

Q How about Senator Cardinale, did he make any remarks or express any views with respect to Assembly Bill 1064?

THE COURT: Who is that?

THE WITNESS: Cardinale, the dentist, said that: We know what the people want. The implication of that being the people wanted the Bill to be overridden. They wanted the veto to be overridden.

He asked rhetorically whether the members of the State Senate were the servants of the people or the courts.

He was pretty clear that he took a public mandate to be more significant than the position of the courts. He did indicate he thought this Bill was a compromise and it ought to be sustained against the Governor's veto.

Q How about Senator Brian Kennedy? Do you have any (p. 651) recollection of any statements made by Senator Kennedy?

A Yes, I do, because I got to know him pretty well, especially in debates over the subject away from the Assembly or the Senate.

He said that: Nobody knows what the kids are doing, but he hopes they are praying.

Q You've indicated that you have debates outside of your appearance at the veto override with Senator Kennedy?

A Yes.

Q With respect to this issue?

A Yes.

Q Prior to the adoption of the statute in question?

A No. As a matter of fact, our debate was over WOR (radio) in New York after the override.

He then went on to explain what he understood the original doctrine of separation of church and state to be, set in an 18th Century context, and applied that there wasn't any development of significance to it, from the initial effort to prevent establishments of religion in the colonies. And he felt, therefore, that the override ought to be knocked down.

Q Reverend, during the debates on the veto override, do you recall whether or not there were any discussions of any substantial nature concerning the pedagogical objectives or purposes of Assembly Bill 1064?

A No, there weren't. There were no discussions that I (p. 652) recognize as related to pedagogy. The only one was a kind of social control argument that Senator Dumont used.

Q Could you characterize, then, for us, what the general tenor of the discussion or debate was with respect to the veto override?

A The override was substantially defeated, that is, the veto was defeated so—

Q Could you characterize the debate or discussion?

A Well, the debate was, was it prayer? Should it be prayer? Was it going to be good for the kids, particularly in terms of bringing order to a presumed chaotic school system.

Senator Feldman argued the school system wasn't chaotic, or in decay, was his word. But the debate was: Did we need this thing to change the climate and life of our school system?

The majority of the Senators felt we did. As far as I could see, they really didn't think any prayer issue was relevant one way or another so long as it had this effect.

For instance, Senator Paolella suggested that the Bill would support discipline and morality. Those were his exact words, saying that it wasn't necessarily a bill that would create prayer in the public schools anymore than smoking marijuana necessarily leads to hard drugs.

Q With respect to the position that has been adopted by the New Jersey Council of Churches, did you bring a copy of (p. 653) that position paper with you?

A Yes, I gave one to you and I have one in my briefcase.

We have a dual position that emphasizes the right for free exercise of religion, which might allow in a given cir-

cumstance the use of the public schools with the same kind of freedom that the Latin Club would have for a student led prayer group. Also, on the other hand, it strenuously objects to any conduct of religious exercises by the secular authorities, which would include the schools.

MS. McHUGH: Judge, I would like to have marked for identification the document reflecting the position of the New Jersey Council of Churches. It will be P-81. I would like to show it to the witness.

THE COURT: All right, yes.

(Exhibit marked P-81 for identification.)

MR. ROBERTSON: Judge, I haven't seen a copy of this document.

MS. McHUGH: I haven't either.

THE COURT: It can't be very momentus.

MR. ROBERTSON: I'm not going to interrupt, but I would like to read it.

THE WITNESS: It is very short, your Honor. We deliberately made it for communications.

THE COURT: Go ahead and read it.

Q Reverend Sarfaty, I would like to show you what has (p. 654) been marked as Plaintiffs' Exhibit 81 and ask you if that's the position paper to which you just referred?

A This is the position paper I drafted to suinmarize our position and took to our board of the dated evening, the 25th of January, 1983, where it was adopted by the

board as policy, and we used it to communicate succinctly our position to the people in our churches and to the press.

Q You've indicated that you communicated this position to the people in your churches?

A Yes. We have a mailing list of several sorts of people. One is all of the clergy, 3500 churches that constitute our 15 denominations, and then we have other shorter lists of people who have special interests, including interests in public affairs.

Q So you communicated back and forth between your organization and the various churches that make up your organization?

A Yes. There are some 15 public issue committees in the various denominations that constitute the Council. Part of my job was to be in communication with those committees as well as the bishops and executives of the 15 groups.

Q Would you describe yourself as at least one source of information for various constitutents of these churches?

A Yes. It is more than a casual issue. It is a key issue for me to be in touch with the people that constitute

* * *

(p. 656) JAMES CONNERTON, being first duly sworn, testifies as follows:

THE CLERK: State your full name, please.

THE WITNESS: My name is James Connerton, C-o-n-n-e-r-t-o-n.

DIRECT EXAMINATION

BY MS. McHUGH:

Q Dr. Connerton, what is your present position?

A I'm the executive director of the New Jersey Education Association.

Q What is the New Jersey Education Association?

A It's an organization of 117,000 members who work in the public schools of New Jersey.

Q Do you represent teachers basically, or—

A We represent all school employees. We have approximately 84,000 teacher members and the remainder are either bus drivers, cafeteria workers, secretaries and retired teachers.

Q Dr. Connerton, you've been asked to testify with respect to Assembly Bill 1064 which is known as the Moment of Silence statute. Are you familiar with that statute?

A Yes.

Q Doctor, did your organization take a position with respect to Assembly Bill 1064?

A We took a position opposed to the enactment of the (p. 657) bill.

Q Pardon me?

A We took a position opposed to the enactment of the Bill.

Q Doctor, do you have a lobbyist who works in Trenton?

A Yes. Five full-time lobbyists and then our president and I, myself, are also lobbyists.

Q In that regard, Doctor, do you follow legislation that's going through the Legislature, whether it's one House or another?

A Yes, we do.

Q And with respect to the position that you adopted on 1064, did you send lobbyists to various education committees and other floor debates on that Bill?

A Yes. We monitered all the debates.

Q And did your lobbyist speak with legislators and convey your position?

A Yes.

MS. McHUGH: Judge, I would like to show the witness an exhibit, the position paper that I believe has been premarked. I just want to find the number.

MR. ALTMAN: Your Honor, I think we omitted to have 81—which I think you ruled in evidence, but it hasn't been marked.

MS. McHUGH: Judge, referring to Plaintiffs' (p. 658) Exhibit 68, the position paper of the New Jersey Education Association. I would like to show this to the witness.

Q Dr. Connerton, I would like to show you what has been marked for identification as Plaintiffs' Exhibit 68 and ask you if that's the position statement that the NJEA adopted with respect to Assembly Bill 1064?

A Yes, it is.

Q What is the position of the NJEA with respect to this Moment of Silence statute?

A We were opposed to the Bill and and this position statement was made available to all legislators.

Q Why are you opposed? Could you tell us?

A We perceive it to be a back door approach to bringing prayer into the schools.

Q You indicated that you conveyed this position to various legislators, is that correct?

A That's true.

Q And did you do that before the override? In other words, while the Bill was going through its committee hearings, et cetera?

A Yes, we did.

Q And as expressed in that particular document that has been marked as P-68?

A Yes.

Q Would various legislators have received copies of that (p. 659) document?

A Yes.

Q Doctor, would you have conveyed your position as it's reflected in P-68 to various members of your organization, that is, your teachers and your cafeteria workers?

A We communicate with our members regularly. Every member receives a newspaper monthly and a magazine monthly. It is through those publications that we carry the word to the individual member.

We also have a local leaders' mailing on a weekly basis which keeps our people more current.

Q So each of your 117,000 members will be receivers of information on a regular basis from you?

A Yes.

MS. McHUGH: Judge, I would like to have one more item marked as an exhibit.

THE COURT: What is that?

MS. McHUGH: A sheet from the NJEA review dated February, 1981, just a single page. It would be marked for identification as P-82.

(Exhibit marked P-82 for identification.)

MR. ROBERTSON: Judge, we haven't received a copy of this before.

Judge, I would like a proffer.

MS. McHUGH: It does deal with a moment of

* * *

(p. 661) Yes, go ahead.

Q Dr. Connerton, I would like to show you what has been marked as Plaintiffs' Exhibit 82 and I ask if you can identify that?

A It is taken from our NJEA review, yes.

Q Doctor, is that the magazine to which you referred in your testimony?

A Yes, it is.

Q That would be the magazine that would be received monthly by your constituents?

A Yes.

Q Have you had an opportunity to review the article that appears on there with respect to the moment of silence or the meditation statute?

A No, but let me do that quickly.

Yes. Okay.

Q Have you had an opportunity, Doctor?

A Yes.

Q What is that? What does it say, Doctor?

A Well—

Q Basically, briefly.

A It refers to an earlier proposal for a three-minute period of silence, and we state our opposition to it or the grounds that it would amount to mandating prayer in the public schools.

(p. 662) Q I see, Doctor. Is this the kind of thing that you were referring to, that you would be communicating to your various members? For example, did you communicate this kind of thing with respect to Assembly Bill 1064?

A Yes.

MS. McHUGH: Judge, I have no further questions of this witness.

THE COURT: All right. Let's see if Mr. Robertson has any questions.

MS. McHUGH: I would like to offer P-82 in evidence.

THE COURT: I'll admit it in evidence as typical of what the New Jersey Teachers Education Association did.

(Exhibit marked P-82 in evidence.)

THE COURT: Any cross-examination?

CROSS-EXAMINATION

BY MR. ROBERTSON:

Q Doctor, on direct examination you were asked whether you communicated with legislators your feelings with regard to 1064. Do you recall that?

A Yes.

Q Did you personally have any communications with any legislators?

A I did not.

Q So all of the testimony that you just previously gave

* * *

PLAINTIFFS' EXHIBIT 55, GOVERNOR THOMAS H. KEAN, LETTER TO THE GENERAL ASSEMBLY

STATE OF NEW JERSEY

EXECUTIVE DEPARTMENT

December 6, 1982

ASSEMBLY BILL NO. 1064

To the General Assembly:

Pursuant to Article V, Section 1, paragraph 14 of the Constitution, I herewith return Assembly Bill No. 1064 without my signature.

This bill requires New Jersey public schools to conduct a one-minute moment of silence at the beginning of each school day to be used solely at the discretion of the individual student for quiet and private contemplation or introspection.

I am concerned that this bill violates the Establishment Clause of the First Amendment of the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment applies this proscription to the states.

On October 7, 1982, Federal District Judge Morton of the Middle District of Tennessee struck down a Tennessee statute which provided "a period of silence not to exceed one minute of duration . . . [to] be observed for meditation

or prayer or personal beliefs." In using the three-prong test set forth by the United States Supreme Court in determining whether State action violates the Establishment Clause, Judge Morton found "that a moment of silence in and of itself is nondiscriminatory and may serve a secular purpose in aid of the education function." Yet, in analyzing the constitutional question, the Federal Judge found that while meditation and reflection can be viewed as carrying meanings that do not touch upon religion, individual terms within a statute cannot be construed in an abstract sense or in a vacuum. He reviewed all the terms together (including prayer) and concluded that the legislative purpose was advancement of religious exercises. Judge Morton did not stop at this point and he went on to say at best the statute was ambiguous, and as such the court had to consider the underlying legislative history.

All courts faced with these types of statutes look to the legislative history in determining their constitutionality. Judge Morton looked with great diligence to the record of debate upon the statute in the Tennessee Houses. He found that the overwhelming intent among the legislators supporting the bill, including the sponsor, was to establish prayer as a daily fixture in the public schoolrooms of Tennessee. Even if that was said to be passed off as political rhetoric, Judge Morton found it was rhetoric clearly inconsistent with standards set in place by the Constitution, and therefore, reflected upon an inappropriate secular purpose.

Public statements of New Jersey Legislators likewise reveal a constitutionally impermissible motive. Legislative discussion in the Senate revealed that the bill's adoption would mean "bringing prayer back into the schools through

the front door." One proponent of the bill said the restoration of prayer in the schools would result in fewer problems in classrooms and that the bill would not harm any school-age child, but rather, it would restore the child's faith in his creator.

Putting the constitutional issue aside, the necessity for this type of State-imposed mandate must be addressed. The bill in essence is a mandatory/voluntary minute of silence. New Jersey public school teachers do not need a legislative mandate of one minute of silence in order to maintain order in their classrooms. Rather, teachers already have the discretion to silence their classes for one minute, five minutes or twenty minutes as they in their wisdom choose. I prefer to leave it to the discretion of individual teachers to decide *if* their students need quiet time for contemplation and introspection and *when* their students may participate in such sessions.

The voluntary aspect of the State-imposed mandate also bothers me for I am not sure what children who voluntarily choose *not* to participate in this moment of silence are able to do. Are the children permitted to make noise or leave the room? Guidelines are not set up in the bill.

I respect the sponsor's zeal and conviction in obtaining passage of A-1064, but I nonetheless must return it without my approval. It is unlikely that the bill could pass constitutional muster, and teachers currently have the authority to call for moments of silence for introspection if such a period is deemed necessary.

Respectfully,
/s/ Thomas H. Kean
GOVERNOR

[seal]

Attest:
/s/ W. Cary Edwards
Chief Counsel to the Governor

PLAINTIFFS' EXHIBIT 56,
NEW JERSEY SENATE ROLL CALL

1982 SESSION

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•Costello		
•Dalton		
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•Dorsey		
•Dumont		
•Ewing		
Feldman		•
•Foran		
•Gagliano		
•Gallagher		
•Gormley		
•Graves		
Gregorio	•	

1982 LEGISLATURE

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Hurley	•	
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•La Rocca		
Laskin		•
•Lipman		
•Lynch		
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•Weiss		
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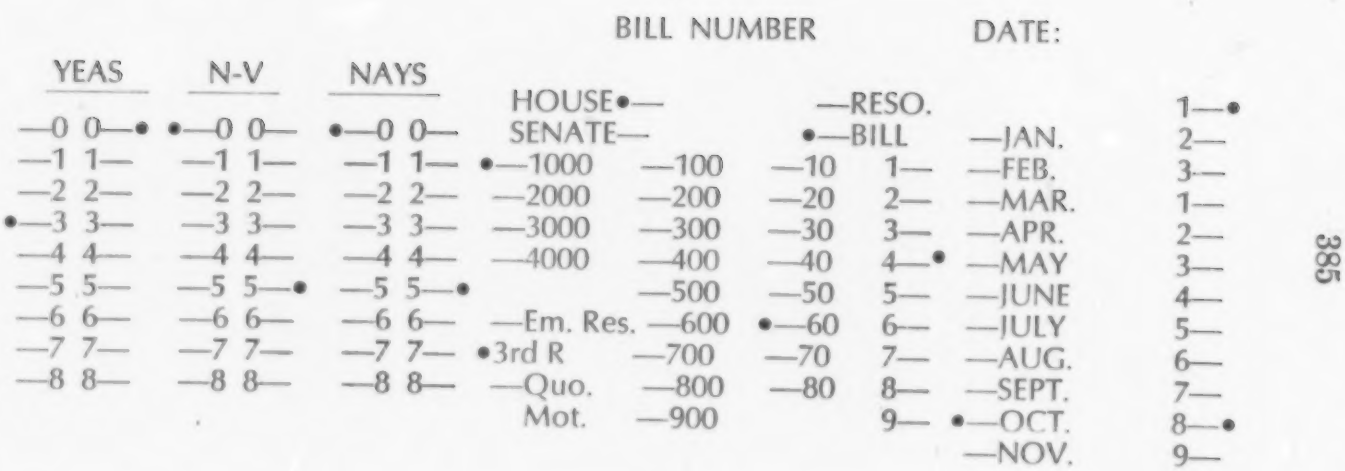
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PLAINTIFFS' EXHIBIT 57,
NEW JERSEY ASSEMBLY ROLL CALL

REGULAR SESSION — 1982 LEGISLATURE

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•Bocchini			•Marsella		
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•Bryant			McEnroe	•	
•Charles			Meyer	•	
•Chinnici			•Miller		
•Costa			•Muhler		
•Cowan			•Muziani		
•Daverin			•Naples		
•Doria			Ogden		•
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•Felice			•Palaia		
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•Fortunato			•Paterniti		

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Gallo, T. •
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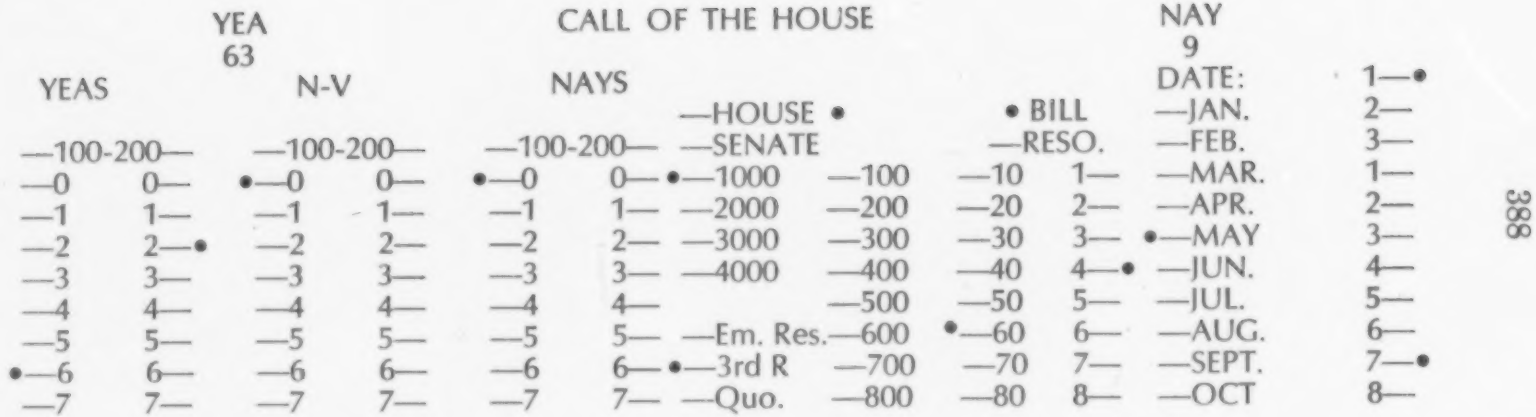
AUTHOR ..... SUBJECT A 1064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PLAINTIFFS' EXHIBIT 58,
NEW JERSEY SENATE ROLL CALL

1982 SESSION — 1982 LEGISLATURE

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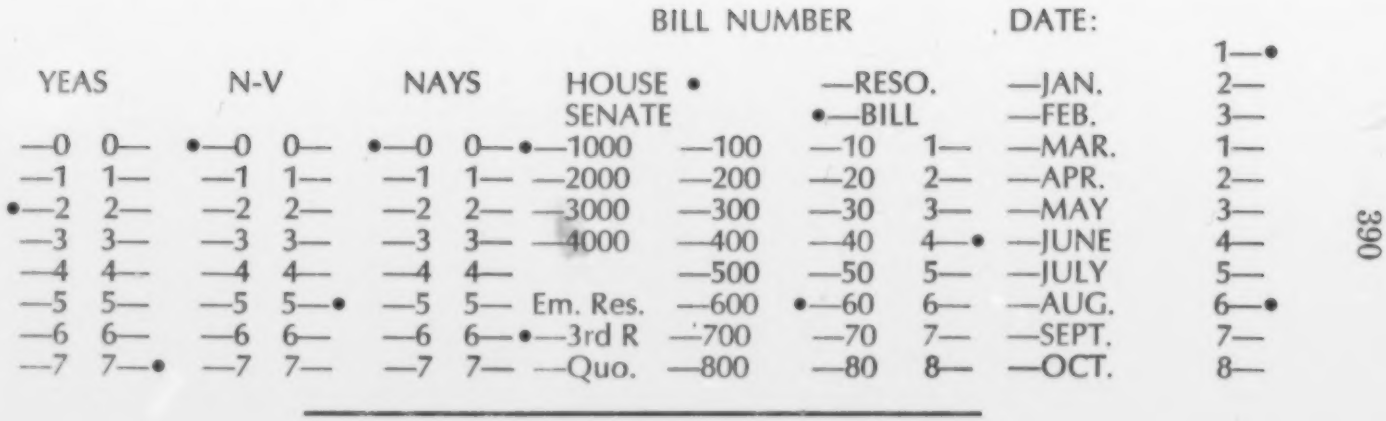
Caulfield	•		•La Rocca		
•Codey			Laskin		•
•Connors			•Lipman		
•Costello			Lynch		•
•Dalton			•McManimon		
DiFrancesco		•	•O'Connor		
•Dorsey			•Orechio		
•Dumont			•Paolella		
•Ewing			Rand	•	
Feldman		•	•Rodgers		
Foran		•	•Russo		
Gagliano		•	•Saxton		
•Gallagher			Stockman		•
•Gormley			•Vreeland		
•Graves			Weiss	•	
Gregorio	•		•Zane		

A 1064 — 27-8 Override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PLAINTIFFS' EXHIBIT 59,
NEW JERSEY ASSEMBLY ROLL CALL

REGULAR SESSION — 1983 LEGISLATURE

YEAS	N-V	NAYS	YEAS	N-V	NAYS
•Adubato			•Kosco		
Albohn		•	LaCorte		•
Baer		•	Lesniak		•
Bennett		•	Littell		•
Bishop		•	•Markert		
•Bocchini			•Marsella		
Brown L.		•	•Matthews		
•Brown W.			Mazur		•
•Bryant			McEnroe		•
Charles	•		•Meyer		
•Chinnici			•Miller		
•Cooper			•Muhler		
•Costa			•Muziani		
•Cowan			•Naples		
•Deverin			Ogden		•
•Doria			•Otlowski		
•Doyle			•Palaia		
•Felice			•Pankok		
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•Franks			•Pellacchia		

(Columns continued on next page)

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AUTHOR .....

OVERRIDE VETO
SUBJECT A 1064

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CALL OF THE HOUSE

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PLAINTIFFS' EXHIBIT 63, GOVERNOR CAHILL VETO OF ASSEMBLY BILL NO. 597, 3/8/71

STATE OF NEW JERSEY,
EXECUTIVE DEPARTMENT,
March, 8, 1971.

ASSEMBLY BILL No. 597

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14(a) of the Constitution, I herewith return Assembly Bill No. 597, without my approval, for the following reasons:

Assembly Bill No. 597 would supplement chapter 36 of Title 18A of the New Jersey Statutes for the purpose of authorizing, at the opening of the school day in each public school classroom, "a brief period of silent prayer or meditation with the participation of all the pupils therein assembled." Furthermore, this measure provides also that the silent prayer or meditation sought to be authorized "shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day."

This bill is a *verbatim* copy of Assembly Bill No. 640 (1968) and Assembly Bill No. 146 (1969), which were returned to the Legislature by Governor Hughes without his approval.

The First Amendment to the United States Constitution provides, in part, that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

These two clauses, the "Establishment Clause" and the "Free Exercise Clause" apply to the several states by virtue of the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court in *Engel v. Vitale,* 370 U.S. 421 (1962) and *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963) has found statutory provisions providing for a voluntary daily program of denominationally neutral prayer and bible reading and recitation of the Lord's Prayer in public schools to be unconstitutional.

Patently, what is proscribed by the Establishment Clause is not the use of any particular form of prayer, but rather any establishment by the state of a religious or devotional exercise in connection with the operation of the public school system. A basic principle which has emerged from the pertinent cases is that the guarantees of the First Amendment concerning religion are observed best by "wholesome neutrality" on the part of the state toward matters sectarian. That is, not to say that the state must be hostile toward religion, but rather steer a careful course between the constitutional prohibition against establishment on the one hand and the constitutional guarantee of free exercise on the other.

This bill which authorizes teachers to conduct a brief period of silent prayer or meditation . . . with the participation of all the pupils therein assembled, invites the interpretation that it is an effort to circumvent court decisions prohibiting religious exercises in public schools. The language of section 2 of the bill that it is not intended to be, and shall not be conducted as, a religious service or exercise does not alter the meaning of the language of the bill which suggests the idea of schools conducting religious exercises. The responsibility for authoritatively interpreting the Constitution rests with the Judiciary. To the extent that this bill would circumvent the decisions of our Courts, it usurps judicial authority and violates the First Amendment of the U.S. Constitution. Insofar as the bill provides for a brief period of meditation, it is unnecessary since there is presently no provision of law which prohibits individual teachers or school authorities from holding moments of silence in the classroom.

No decision of the United States Supreme Court rendered subsequent to the veto of A-146 (1969) has altered constitutional doctrine announced in *Engel v. Vitale,* 370 U.S. 421 (1962) and *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

I must conclude, accordingly, that Assembly Bill No. 597 (1970) suffers the same infirmities as its predecessors and must likewise be returned to the Legislature without my approval.

Respectfully,

[SEAL] /s/ WILLIAM T. CAHILL

Attest: *Governor.*

/s/ JEAN E. MULFORD,

Acting Secretary to the Governor.

PLAINTIFFS' EXHIBIT 64, GOVERNOR BYRNE'S VETO OF ASSEMBLY BILL NO. 648 (OCR), 3/3/78

ASSEMBLY BILL No. 648 (OCR)

STATEMENT

I am filing Assembly Bill No. 648 (OCR) in the State Library without my approval.

Under the provisions of Article V, Section 1, Paragraph 14(b) of the Constitution, this bill does not become a law if it is not signed within the 45-day period, Sundays excepted, folowing the adjournment *sine die* of the Legislature. In these circumstances there is no provision for a veto, but I deem it to be in the public interest to state my reasons for deciding not to sign the bill.

This bill would require that, in each public school classroom, the teacher must, at the opening of school upon every school day, conduct a brief period of silent meditation with the participation of all the pupils therein assembled.

Legislation similar to this is in place in other states including Connecticut, Pennsylvania, Massachusetts and Arkansas. The Massachusetts statute has been upheld by a Federal district court. Notwithstanding the existence of such other statutes, it appears arguable that the United States Supreme Court could find the statute unconstitutional as a violation of the Establishment Clause or the Free Exercise Clause of the First Amendment. However, if a court were to find the statute constitutionally acceptable, the question becomes, "What purpose is served by this legislation?" If the few moments of silence indeed do not constitute prayer, neither can they realistically serve as moments when children can truly "meditate" and consider their thoughts. And what is the teacher to say when a child asks what he is to do with his moment of silence? I noted with interest the specific response which the court in the Massachusetts Federal court case found acceptable. The teacher in response to such a question from the child, is to say: "We are dong this in compliance with State Law. Any other questions you have should be discussed

with your parents or with someone in your home." A child who is not properly advised at home will be at a loss to understand this directive. And even the child who is advised at home to pray during this period must wonder at the meaning of this terse explanation of some State-imposed requirement to keep still.

It is very important to remember that any teacher can currently require the moment of silence meditation this bill mandates for children at the beginning of each school day. Some teachers can effectively and sensitively ask the children in their classroom to stop and reflect for a few moments. For others, a State-imposed requirement that they keep their classes quiet for a moment simply to be "in compliance with State law" will only breed disrespect for the teachers, the State, and most distressingly, for the value of such moments of silent reflection. This bill sets down an absolute mandate for a moment of silence at the beginning of each day. I prefer to leave it to the discretion of the teacher to decide if he or she can convey to the children the value and comfort of such moments of silence, either for prayer or otherwise.

Accordingly, I will file Assembly Bill No. 648 (OCR) without my approval.

Respectfully,

[SEAL] /s/ BRENDAN BYRNE,
Governor.

Dated: March 3, 1978.

* * *

PLAINTIFFS' EXHIBIT 65, GOVERNOR BYRNE'S VETO ON ASSEMBLY BILL NO. 2197 (OCR), 5/4/81

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

May 4, 1981

ASSEMBLY BILL NO. 2197 (OCR)

To the General Assembly:

Pursuant to Article V, Section 1, Paragraph 14(a) of the Constitution, I am returning Assembly Bill No. 2197 (OCR) without my approval because I believe it is either unconstitutional or unnecessary.

Respectfully,

/s/ Brendan Byrne
GOVERNOR

Attest:

/s/ Harold L. Hodes
CHIEF OF STAFF, SECRETARY

PLAINTIFFS' EXHIBIT 67, THE NEW JERSEY COUNCIL OF CHURCHES RELEASE

THE NEW JERSEY COUNCIL OF CHURCHES
116 North Oraton Parkway - East Orange,
New Jersey 07017 - (201) 675-8600
176 West State Street - Trenton, New Jersey 08608 -
(609) 396-9546

For Release Jan. 17, 1983
Contact Person:
Rev. Dudley E. Sarfaty

President Marvin McMickle of the New Jersey Council of Churches announced today that his organization's Governing Board has voted to officially intervene as *amicus curiae* in the school prayer lawsuit of 8 New Jersey Citizens, May v. Cooperman *et al*, being represented by Pellettieri, Rabstein and Altman of Trenton. Pastor McMickle said that the Council obviously believes deeply in prayer, but has the firm determination that government should not determine the WHEN, WHERE and HOW of prayer. "That would violate the United States' and New Jersey's constitutions. So we continue to support the judgments of our state's Governor and Attorney General."

President McMickle said that the Council, as the state's broad based ecumenical arm of 15 Protestant denominations, knew that there could be "no prayer without faith", and that, whether the government was leaving faith out or trying to introduce it, in either case they were in error.

"Such government regulation is offensive to our religious tradition," he said.

The Pastor of the St. Paul's Baptist Church of Montclair continued: "Even words ostensibly secular, such as Contemplation and Introspection are conceived by us to be two major components of Prayer . . an integral part of our communication with the Divine."

Rev. Mr. McMickle strongly disagreed with the legislators who claim that putting prayer back into the public schools will solve such discipline, moral and educational problems as exist. "Those are deep and complex social problems which need to be addressed with a longer lasting fervor than the advocates of school prayer seem to be willing to commit."

"Nothing now prevents our children from praying silently at any part of the school day. It is not government's role to encourage, discourage or regulate it. Our constant commitment is to faithful religion in a context of religious liberty and American pluralism."

Mr. McMickle criticized the school silence law as "one more in a stream of 17 school prayer bills which have been proposed in N.J. since 1970. The law, as written, is so vague, that it is almost impossible to apply. It would easily permit administrators and teachers to apply it unconstitutionally. In fact, we have already had word of at least one school district where the students have specifically been told to 'stand up and pray'.

"Our commitment to prayer is sure and certain. As the legislators seek to serve the school children of our state we remind them that returning prayer to N.J. Public Schools would not achieve the urgent social goals so dear to our citizens."

AFRICAN METHODIST EPISCOPAL CHURCH, New Jersey Conference; AFRICAN METHODIST EPISCOPAL ZION CHURCH, New Jersey Conference; AMERICAN BAPTIST CHURCHES OF NEW JERSEY; CHRISTIAN CHURCH, Northeastern Area Association; EPISCOPAL CHURCH, Diocese of Newark, Diocese of New Jersey; GENERAL BAPTIST CONVENTION OF NEW JERSEY; LUTHERAN CHURCH IN AMERICA, New Jersey Synod; OLD ROMAN CATHOLIC CHURCH; REFORMED CHURCH IN AMERICA, Particular Synod of New Jersey; RELIGIOUS SOCIETY OF FRIENDS,

New York Yearly Meeting; THE SALVATION ARMY; UNION AMERICAN METHODIST EPISCOPAL CHURCH; UNITED CHURCH OF CHRIST, Central Atlantic Conference; UNITED METHODIST CHURCH, New Jersey Conferences; UNITED PRESBYTERIAN CHURCH IN THE U.S.A., Synod of the Northeast.

PLAINTIFFS' EXHIBIT 69, NEW JERSEY SCHOOL BOARDS ASSOCIATION POSITION STATEMENT, 12/13/82

(SEAL) NEW JERSEY

SCHOOL BOARDS ASSOCIATION

Headquarters: 315 West State Street, P.O. Box 909,
Trenton, New Jersey 08605
Telephone (609) 695-7600

POSITION STATEMENT

A-1064
(Zangari)

A "MOMENT OF SILENCE" IN NEW JERSEY'S PUBLIC SCHOOLS

This past week, after long and careful consideration, Governor Thomas Kean returned A-1064 to the Legislature with an absolute veto on the grounds that the moment of silence required by the bill was constitutionally impermissible in its intent and unnecessary in its actual application.

The New Jersey School Boards Association concurs with the Governor's assessment. Although "prayer" is not specifically mentioned in this legislation, requiring a "moment of silence" for voluntary student meditation and introspection is clearly directed toward encouraging public—albeit silent—prayer, and as such violates the spirit of the First Amendment.

If, as proponents argue, the sole purpose of this legislation is to provide students with an opportunity to collect their thoughts and prepare for a day's learning, then there is no reason to require such an opportunity by law. At present, any teacher may conduct a period of silence at his or her own discretion to maintain order and foster concentration; any student who wishes a moment to gather his or her own thoughts—whether religious or secular—is legally free to do so.

The duty of the State Legislature is neither to pass judgment on the desirability of "restoring" prayer to the public schools nor to impose disciplinary procedures on the classroom teachers of New Jersey, but to uphold the United States Constitution and protect the citizens of this state from unwarranted intrusions into the control of their public schools.

THE NEW JERSEY SCHOOL BOARDS ASSOCIATION URGES YOU TO SUSTAIN THE GOVERNOR'S VETO AND VOTE *NO* ON A-1064!

12/13/82-102/2435w

PLAINTIFFS' EXHIBIT 77, MEMORANDUM BY MARIANNE RHODES ON ASSEMBLY EDUCATION COMMITTEE MEETING, MONDAY, MAY 17, 1982

M E M O R A N D U M

TO: GOVERNMENTAL RELATIONS

FROM: MARIANNE

SUBJECT: ASSEMBLY EDUCATION COMMITTEE MEETING MONDAY, MAY 17, 1982

DATE: MAY 18, 1982

The following members of the committee were present: Garvin, Chairwoman; Rocco, Doria, Naples, Palaia. The following bills were discussed. Please note action taken.

S-144 (Rand). Prohibits the sale of food of minimal nutritional value in any elementary or secondary school in this state from the beginning of the school day until the last lunch period. Senator Rand was present to speak in support of his bill. He stated that the Senate Committee had removed from the bill the list of junk food that had been included so that currently the Senate Committee Substitute simply requires all elementary and secondary schools to observe the federal standards for "junk food". In 1980 the U.S. Department of Agriculture promulgated rules and regulations regulating the sale of junk foods. Currently, these regulations only apply to those schools participating in the national school lunch and breakfast programs. The Senate Committee Substitute requires all elementary and secondary schools in the state to observe the federal standards for junk foods. All but 35 of New Jersey's school districts now participate in the National School Lunch Program and so they are already prohibited from selling "junk food" (By USDA Standards) until after the last lunch period. Therefore, this mandate would affect only those 35 school districts which would now be prohibited from selling junk food until after the last lunch period.

Those groups speaking in support of the legislation were the Dental Association, the department of education, and NJSBA. Ted Reid offered an amendment which was accepted by the sponsor, Senator Rand, which deleted the reference in the bill to the rule-making sections of the *Federal Register* (Delete, "in through 6758", lines 2 through 4). The committee agreed to amend the bill as recommended, and the bill was released by unanimous vote.

A-1064 (Zangari). This bill would require principals and teachers in all schols within the state to permit a student to observe a one-minute period of silence before the opening exercises of the school day. The period of silence is to be used for a private contemplation or introspection. Assemblyman Zangari was present to speak in support of his bill. He indicated that the bill had been reduced to only 54 words and that it was very important that our society get back to the religious values which are deeply embeded in our ideals. He quoted from President Reagan who has expressed his support for a constitutional amendment to permit school prayer. Present to testify against the bill was the American Civil Liberties Group and the NJASA who stated they felt there was a constitutional problem with the legislation. Ted Reid from NJSBA also indicated that the Association opposed the legislation. He referred to the U. S. District Court for the State of Massachusetts who found a statute which required a period of silence for meditation in that state to be constitutional. The court held that the state had a legitimate secular purpose in acting this statute, and that the pupils tend to learn greater self discipline and respect from authority from the required moment of silence. In other words, the court found that the statute could be interpreted as having a purpose other than the encouragement of prayer. He stated that the bill is unnecessary since a board could adopt a policy which would require teachers to offer students the opportunity to observe a period of silence currently. That is assuming that the silence would be used for a secular purpose rather than a religious one. While student participation in the period of silence in this bill is voluntary, the bill is a mandate insofar as the boards are required to provide

the minute of silence. Although there were no comments from the public in support of the legislation, the members of the committee all expressed positive comments regarding the legislation. The bill was released by unanimous vote.

A-177 (Rocco). This bill provides that a high school drivers license applicant's written examine may be read by a certified special education teacher to certain reading disabled students with the students recording their responses on the appropriate answer sheet. The sponsor, Assemblyman Rocco, submitted an amendment to add driver education instructors to page 1, section 1, line 5. After "certified", insert "driver education instructor or" Rocco stated that this bill would help pupils who have reading problems to take the written exam for a driver's license in a school environment.

NJSBA spoke in support of the legislation but raised the question interesting enough, there is no requirement for students to be able to read road signs in order for them to be issued a driver's license. Bob Swissler from the department of education spoke in support of the legislation stating that this would affect the approximately 7,000 special education students in the state. The committee agreed to support the amendment and voted to release the bill as amended.

A-1367 (Garvin). This bill amends the pre-school handicapped statute to change the effective date of program implementation from the 1982-83 school year to the 1983-84 school year, which was the intent of the legislation when the bill became law. For the purpose of calculating state aid for the 83-84 school year, the resident enrollment in each district shall be adjusted by an amount equal to the number of pre-school handicapped pupils 3 through 5 years of age enrolled as of the last school day of September 1982 or the estimated number of such pupils to be situation in Newark which has just had a referendum and agreed to go to an elected school board. The bill provides that each board member be elected by ward, or which there are five, and four members be elected at large. The Department

of Education spoke in opposition to the bill, stating that it created too political a situation because it sets up a ward constituency which doesn't necessarily take into consideration the entire district's needs. The NJSBA stated that although we had official position on the bill, some ward representation does make sense because it is such a large city. Senator Wynona Lipman spoke in support of her legislation, stating that she has a letter from Mayor Gibson and the City Administration requesting this bill be passed. She said it does a great deal to solve the problem of ethnic representation since there are various ethnic populations in the different wards of the city. This bill will enable each ward to have their own representation. Senator Feldman is a co-sponsor of the legislation. *The committee voted to release the bill and did not consider any amendments.*

S-435 (Codey). Provides that any institution or program of education that serves senior citizens shall be eligible to receive proceeds from the state lottery. The purpose of the bill is to expand the use of lottery to eligible senior citizens. Apparently, there was over $230 million in lottery money, which will be available for these programs in 1983. Currently, the allocation of the lottery fund is divided among various direct state services and state aid. In the area of education the Katzenbach School for the Deaf, and Project Co-ed received money from the lottery fund in addition to a number of other state institutions. Nonpublic school aid, educational improvement centers, school building aid, debt service, and school building aid also received a portion of the lottery money. *A technical amendment was made to the bill which was then released as amended.*

A-1064 (Zangari). Permits students of public schools to participate in a one-minute period of silence before the opening of each school day. While this bill permits students to observe the period of silence, it requires teachers to provide the moment of silence each morning. Assemblyman Zangari was there to speak on his bill. Senator Feldman once again asked the question, "Since there is

nothing that prohibits students from praying, why is this bill necessary?'' Zangari responded, ''They publicly won't do it unless they are directed.'' Feldman stated, ''Prayer should be done in the home. This is simply another way of bringing back religion in the schools. I believe in separation of church and state.'' Senator Ewing: ''Why shouldn't this be allowed? Why not give students the opportunity?'' A good deal of squabbling went back and forth between Feldman, Zangari, and Ewing; Senator Dalton remained rather quiet on the issue. NJSBA spoke in opposition; however, there were three votes for release and *the committee decided to release the bill so that it could be in a position for the entire floor to debate the issue.* Senators Dumont, Ewing and Dalton (reluctantly) voted yes; Senator Feldman voted no.

NOTICE OF APPEAL FILED FEBRUARY 14, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, As natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually, Plaintiffs, vs. DR. SAUL COOPERMAN, Commissioner of The Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, Defendants and	Civil Action No. 83-89 NOTICE OF APPEAL

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO, As President of the New Jersey Senate and the NEW JERSEY SENATE,

Defendant-Intervenors

Notice is hereby given that Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate and the New Jersey Senate, defendant-intervenors above named hereby appeal to the United States Court of Appeals for the Third Circuit from the Final Judgment entered in this action on the 10th day of November, 1983 and as further amended by Order dated the 26th day of January, 1984 allowing counsel fees and costs to the plaintiffs.

MARINARI & FARKAS, P.A.

By /s/ Lawrence T. Marinari
Attorney for Defendant-Intervenors Alan J. Karcher as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, Carman A. Orechio as President of the New Jersey Senate and the New Jersey Senate

and

/s/ Robert A. Farkas

ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED JANUARY 27, 1987 POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION TO THE HEARING OF THE CASE ON THE MERITS

SUPREME COURT OF THE UNITED STATES

No. 85-1551

Alan J. Karcher, Speaker of the New Jersey Assembley, et al.,

Appellants,

v.

Jeffrey May, et al.

APPEAL from the United States Court of Appeals for the Third Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

January 27, 1987

Supreme Court, U.S.
FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

In The

Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether Alan J. Karcher and Carmen A. Orechio, individually and as the representatives of the majority of the 200th New Jersey Legislature which enacted N.J.S.A. 18A:36-4, have standing to appeal from the judgment entered in this matter by the United States Court of Appeals for the Third Circuit.

2. Whether a state statute which permits public school students, before the opening exercises of each school day, to observe one minute of silence to be used solely at the discretion of the individual student for quiet and private contemplation or introspection violates the Establishment Clause of the First Amendment.

3. Whether in this First Amendment Establishment Clause case the court of appeals erred, as a matter of law, by failing to engage in plenary review of the district court's finding under this Court's ruling in *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984).

PARTIES TO THE PROCEEDING

Appellants: In addition to Alan J. Karcher, the appellants herein (defendants-intervenors-appellants in the court of appeals) are the New Jersey General Assembly, Carmen A. Orechio, as President of the New Jersey Senate, and the New Jersey Senate (hereinafter the "Legislature").

Saul Cooperman, the Commissioner of the New Jersey Department of Education, the New Jersey Department of Education, the Edison Township Board of Education and the Old Bridge Township Board of Education were all named as defendants in the original complaint, but took no active role in the proceedings before either the district court or court of appeals.

Appellees: In addition to Jeffrey May, individually, Jean Ross, as natural parent of Damon Ross, an infant, and Jean Ross, individually; Bonnie Schorske, as natural parent of Mark Tulloss, an infant, and Bonnie Schorske, individually; Brenda Butler, individually, and Gary Drew, individually, were appellees in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Facts	2
B. Decision Of The District Court	6
C. Decision Of The Court Of Appeals	8
SUMMARY OF ARGUMENT	9
A. Justiciability Issue	10
B. Establishment Clause Issue	11
C. Standard Of Review Issue	13
ARGUMENT:	
I. THERE EXISTS ON THIS APPEAL A JUSTICIABLE CASE OR CONTROVERSY	14
(A) Alan Karcher, Carmen Orechio And The 200th Legislature Have An Abiding And Continuing Interest In The Subject Matter Of This Case Sufficient To Sustain Standing To Prosecute This Appeal	15
(B) As Proper Party-Defendants Below, Alan Karcher, Carmen Orechio And The 200th Legislature Have A Statutory Right To Maintain This Appeal	22

TABLE OF CONTENTS—Continued

Page

(C) The Action Of The Court Below, In Intrusively And Incorrectly Probing The Legislative Process By Which The MOS Was Enacted And By Holding The Law To Be Invalid, Constitutes "Judicial Nullification" So As To Give Standing To The Majority Of The 200th Legislature To Seek Appellate Review 23

II. THE COURT OF APPEALS MAJORITY ERRED AS A MATTER OF LAW IN HOLDING NEW JERSEY'S MOMENT OF SILENCE LAW UNCONSTITUTIONAL BASED UPON A FINDING THAT THE MOS LACKED ANY PLAUSIBLE SECULAR PURPOSE 27

(A) The Constitutional Standard: The Three-Part Test 27

(B) The Majority Of The Court Of Appeals Erred In Its Interpretation And Application Of The Purpose Prong Of This Court's Tripartite Establishment Clause Test By Accepting And Endorsing The Basis By Which The District Court Determined That The MOS Lacked Any Plausible Secular Purpose 29

(C) Under A Proper Purpose Analysis, Giving Due Regard To All Of This Court's Teachings Under The Establishment Clause, The MOS Is Constitutional 38

III. THE COURT OF APPEALS ERRED IN APPLYING A "CLEARLY ERRONEOUS" STANDARD TO REVIEW THE TRIAL COURT'S "FACTUAL" DETERMINATION THAT THE STATUTE LACKS A SECULAR PURPOSE 43

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

CASES

Acheson v. Fujiko Furusho, 212 F.2d 284 (9th Cir. 1954) 18

Ameron v. U.S. Army Corps of Engineers, 787 F.2d 875 (3d Cir. 1986) 23

Arizona v. California, 283 U.S. 423 (1931) 34

Bender v. Williamsport Area School District, — U.S. —, 106 S.Ct. 1326 (1986) 20, 46

Bob Jones University v. United States, 461 U.S. 574 (1983) 45

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 9, 13, 14, 28, 43, 44, 45, 46

Brasslet v. Cota, 761 F.2d 827 (1st Cir. 1985) 46

Coleman v. Miller, 307 U.S. 433 (1939) 23

Committee for Public Education v. Regan, 444 U.S. 646 (1980) 42

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 39

Daniel v. Family Secur. Life Ins. Co., 336 U.S. 220 (1949) 31

Diamond v. Charles, — U.S. —, 106 S.Ct. 1697 (1986) 21, 23

Director, Office of Workers' Compensation Programs, etc. v. Perini North River Associates, 459 U.S. 297 (1983) 22

Epperson v. Arkansas, 393 U.S. 97 (1968) 39, 41

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 12, 21, 37, 41, 45

Everson v. Board of Education, 330 U.S. 1 (1947) 39, 41, 42

Ex parte Hague, 105 N.J. Eq. 134, 147 A. 220 (1929) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Fiske v. Kansas, 274 U.S. 280 (1927) 45

Fletcher v. Peck, 10 U.S. 87 (1810) 34

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 23

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 33

Grosjean v. American Press Co., 297 U.S. 233 (1936) 33

INS v. Chadha, 462 U.S. 919 (1983) 23

Jacabellis v. Ohio, 378 U.S. 184 (1984) 47

Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) 20

Larson v. Valente, 456 U.S. 228 (1982) 38

Lebron v. Washington Metro Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) 46

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) 10, 27, 28, 38, 39, 44

Lynch v. Donnelly, 465 U.S. 668 (1984) 12, 33, 39, 42, 45

Marsh v. Chambers, 463 U.S. 783 (1983) 38

McCray v. United States, 195 U.S. 27 (1904) 34

McGowan v. Maryland, 366 U.S. 420 (1961) 38, 41, 42

McMullen v. Carson, 754 F.2d 458 (9th Cir. 1984) 46

McRae v. Mathews, 421 F.Supp. 533 (E.D.N.Y. 1976), *appeal dismissed, Buckley v. McRae*, 433 U.S. 916 and *vacated, Califano v. McRae*, 433 U.S. 916 (1977), *reh'g denied, Califano v. McRae*, 434 U.S. 881 (1977) and on *remand, McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y. 1980), *rev'd Harris v. McRae*, 448 U.S. 297 (1980), *rehearing denied, Harris v. McRae*, 448 U.S. 917 (1980) 25, 26

Miller v. California, 413 U.S. 15 (1973) 46

Miller v. Fenton, — U.S. —, 106 S.Ct. 445 (1985) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Mueller v. Allen, 463 U.S. 388 (1983) 12, 36, 42

Munro v. Socialist Workers Party, — U.S. —, 107 S.Ct. 533 (1986) 45

Palmer v. Thompson, 403 U.S. 217 (1971) 35

Presbyterian and Reformed Publishing Co. v. Commissioner of Internal Revenue, 743 F.2d 148 (3d Cir. 1984) 45

Poovey v. Edminsten, 526 F.Supp. 759 (E.D.N.C. 1981) 20

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 30

S&E Contractors v. United States, 406 U.S. 1 (1972) 41

School Dis. of Abington Township v. Schempp, 374 U.S. 203 ..... 36, 39

Schweiker v. Hogan, 457 U.S. 569 (1982) 31

Sloan v. Lemon, 413 U.S. 825 (1973) 39

Stone v. Graham, 449 U.S. 39 (1980) 39, 40

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 46

United States v. O'Brien, 391 U.S. 367 (1968) 32, 33, 34, 35

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 26

Wallace v. Jaffree, 472 U.S. 38 (1985) 8, 10, 11, 17, 36, 37, 38, 39, 40, 41, 42

Warth v. Seldin, 422 U.S. 490 (1975) 26

Washington v. Davis, 426 U.S. 229 (1976) 33

Widmar v. Vincent, 454 U.S. 263 (1981) 42

Witters v. Washington Dept. of Services for the Blind, — U.S. —, 106 S.Ct. 748 (1986) 45

Zorach v. Clauson, 343 U.S. 306 (1952) 30, 31, 42

TABLE OF AUTHORITIES—Continued

Page(s)

UNITED STATES CONSTITUTION CITED

First Amendment ..... *passim*

Fourteenth Amendment 2, 4, 46

STATUTES CITED

28 U.S.C. § 1254(2) 1

28 U.S.C. § 1254(b) 11, 22

28 U.S.C. § 2201 4

28 U.S.C. § 2202 4

42 U.S.C. § 1983 4

N.J.S.A. 18A:36-4 ..... 1, 2, 3, 28, 43

RULES CITED

Fed.R.Civ.P. 24(a)(2) 24

Fed.R.Civ.P. 26(c) 5

Fed.R.Civ.P. 52(a) 13, 14, 43, 47

OTHER AUTHORITIES

Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962)* 36

Choper, *Religion in the Public Schools; A Proposed Constitutional Standard*, 47 *Minn. L. Rev.* 329, 371 (1963) 36

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Kauper, *Prayer, Public Schools and the Supreme Court*, 61 *Mich. L. Rev.* 1031, 1041 (1963) 36

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This appeal[1] is taken from the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 24, 1985, affirming the decision of the United States District Court for the District of New Jersey and declaring unconstitutional N.J.S.A. 18A:36-4, under the Establishment Clause of the First Amendment to the United States Constitution. Appellants respectfully ask this Court to reverse the judgment of the United States Court of Appeals for the Third Circuit entered in this matter.

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OPINIONS BELOW

The majority and dissenting opinions of a panel of the United States Court of Appeals for the Third Circuit dated December 24, 1985 are reported at 780 F. 2d 240 (3d Cir. 1985). The opinion of the United States District Court for the District of New Jersey dated October 24, 1983 is reported at 572 F. Supp. 1561 (D.N.J. 1983).[2]

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JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 24, 1985. (J.S.A. 103a). The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by 28 U.S.C. § 1254(2). Appellants' notice of appeal was filed in this Court on March 19, 1986. (J.S.A. 106a).

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[1] On January 27, 1987, this Court granted further review of this appeal but postponed ruling on the question of jurisdiction until a hearing on the merits.

[2] References herein to the opinions and judgments below will be by citation to the Appendix of appellants' Jurisdictional Statement (hereinafter "J.S.A.") filed in this Court on March 19, 1986. References to the Joint Appendix filed herewith will be designated "J.A."

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18A, New Jersey Statutes Annotated, Chapter 36-4 (West 1982), commonly referred to as the Moment of Silence Statute (hereinafter the "MOS"), provides that:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

The First Amendment to the United States Constitution (in pertinent part), provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the United States Constitution (in pertinent part), provides that:

> Section 1.
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

A. Facts

The MOS was introduced in the New Jersey General Assembly (hereinafter "Assembly") in March of 1982 as Assembly Bill 1064 by 55 sponsoring assembly persons. (J.S.A. 110a). Aside from its text, the only published official statements by the Legislature regarding the MOS

were contained in its preamble and in an official statement which accompanied the Bill when it was voted into law.[3]

Initially, the Bill passed both the Assembly and the Senate and was forwarded to Governor Thomas Kean for signature. Governor Kean vetoed the Bill and returned it to the Assembly. In his letter returning the bill to the Assembly, the Governor stated concern over the Legislature's motive in passing the MOS and questioned the necessity for a law mandating a minute of silence in public schools for student contemplation and introspection. (J.A. 381).

On December 13, 1982, the Assembly voted to override the Governor's veto by a vote of 57 to 17 (J.A. 391), and on December 16, 1982, the Senate voted to override the veto by a vote of 27 to 8. (J.A. 389). The MOS became law immediately.

After its enactment, the MOS was communicated to all school districts by the New Jersey Department of Education without administrative guidelines or comment. (J.A. 22-23). The MOS was implemented in some school districts prior to the 1982 Christmas recess and reaction to its enactment and implementation by some students, parents and a teacher precipitated the filing of the instant lawsuit.

On January 10, 1983, plaintiffs-appellees (hereinafter the "plaintiffs"), parents, students and a teacher, brought suit against the Commissioner of the Department of Edu-

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[3]Those statements provided respectively as follows:

> An Act to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.
>
> * * *
>
> This Bill allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student.

(J.S.A. 110a).

cation, the New Jersey Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education, pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief. (J.A. 13). The plaintiffs alleged that the MOS: violated the Establishment Clause of the First Amendment; violated the Due Process provisions of the Fourteenth Amendment; was void on its face; and violated provisions of the New Jersey Constitution.[4]

With the filing of the complaint, plaintiffs moved for a temporary restraining order (J.A. 47) supported, *inter alia*, by plaintiffs' affidavits, a brief and an appendix of exhibits which included copies of previously considered legislation dating back to 1970 and selected newspaper articles purporting to report statements of various legislators, editors, and citizens with regard to both the MOS and prior bills, and the affidavit of Reverend Dudley E. Sarfaty setting forth his recollection of remarks he overheard during legislative debates prior to the Legislature's override of the Governor's veto. (J.A. 23-46). While the district court initially found the MOS both neutral on its face and not by its terms mandating prayer, the court nonetheless entered a temporary restraining order after an examination of the materials plaintiffs had submitted, which the court concluded revealed an improper legislative intent in enacting the MOS. (J.A. 50).

On January 18, 1983, in recognition of the fact that no named party-defendant would actively oppose plaintiffs' suit, and with the consent of plaintiffs, the district court granted the intervention motion of Alan J. Karcher;

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[4] At trial, plaintiffs presented no evidence regarding alleged violations of the New Jersey Constitution and neither the district court nor the court of appeals addressed this particular claim in their respective opinions. As a consequence, the claim is deemed waived on this appeal.

the New Jersey General Assembly; Carmen A. Orechio; and the New Jersey Senate. (J.A. 53; Mot. to Dism. or Aff. App. 11a). Thereafter, the temporary restraints were continued by consent of the parties pending a hearing on the merits.

On January 26, 1983, plaintiffs served interrogatories, and a notice to take the depositions of fifty current and former legislators. Plaintiffs sought to require the named legislators to: (1) affirm statements reported in the news articles annexed to the plaintiffs' application for the temporary restraining order; (2) provide statements as to their motivation, understanding or purpose in introducing certain legislation; (3) disclose material that they had relied upon in considering not only the current law but, also previously proposed legislation; (4) provide copies of any documentation they had received and reviewed, as well as to provide documentation they had prepared in form of correspondence with any constituents, relating to the current law and to the prior bills and a joint resolution that plaintiffs identified in their notice of deposition.

In response to a motion by the Legislature (J.A. 58) for an order suppressing discovery on the basis of legislative privilege and under the provisions of FED. R. CIV. P. 26(c), the district court concluded, without deciding the issue of legislative privilege, that it would be inappropriate for legislators to be required to give testimony concerning their legislative activities. In accordance with its holding, the court limited the information that the Legislature was required to supply in discovery.

On April 20, 1983, the district court granted plaintiffs' motion *in limine* permitting plaintiffs to offer into evidence at trial newspaper articles containing fragmentary "statements" of a handful of legislators, editorials, citi-

zens' letters, and reports on the MOS' implementation. The court, over the objection of the Legislature on the grounds of violations of legislative privilege and federal evidence rules pertaining to hearsay, granted the motion on the ground that the material would help establish the "overall public perception of the activity mandated by the statute as secular or religious in nature." (J.A. 120).

B. Decision of the District Court

Trial on the merits commenced on September 13, 1983. Plaintiffs presented live testimony from thirteen witnesses, by stipulation introduced the previously filed affidavits of the plaintiffs (J.A. 129) and, over the continuing objections of the Legislature, introduced a multitude of documents containing copies of bills previously considered by prior independent New Jersey Legislatures dating back to 1970, newspaper articles containing statements of a handful of legislators, editorials, citizens' letters, photographs and news reports of the MOS' implementation. (App. Vol. V).[5] The plaintiffs' proofs consisted of predictions as to how the MOS might be used by teachers and students for religious purposes (J.A. 147; 157); what had allegedly been said by *some* legislators both during and outside legislative debates (J.A. 261-272; 272-283; 367-375); the opposition positions of three educator associations (J.A. 284-300; 375-380; 403); some parent and student reactions to the law (J.A. 23-46; 227-260); the reaction of a teacher (J.A. 38); and opinions as to the law's lack of educational utility. (J.A. 38-41; 188-226; 238-239; 301-312). Two students described how the MOS had been implemented in their classrooms. (J.A. 24-27).

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[5] Because of their size, the newspaper articles admitted into evidence at trial could not be printed in the Joint Appendix filed with this Court. Citation to those articles will be denoted by reference to the appendix volume wherein they appear in the Joint Appendix filed with the court of appeals, e.g., "App. Vol. V."

The Legislature produced testimony from five witnesses. The Legislature's proofs consisted of a psychologist who reported the results of his research project to determine the objective effect of a moment of silence exercise in actual operation (J.A. 313-326); two Sayreville, New Jersey, school teachers who described the operation of a moment of silence exercise in their school district for over ten years (J.A. 327-332; 333-350); a professor of sociology and education who described the pedagogical utility of a moment of silence to create a transition between non-school and school (J.A. 352-360); and a professor of journalism who testified regarding the inability to accurately determine public perception or reliably predict public reaction from examination of the news articles presented by the plaintiffs. (J.A. 361-366). The Legislature also presented a videotape of a December 17, 1982, WCBS-TV (New York) news report concerning the Sayreville practice described by the two teachers. (App. Vol. V).

Based on findings of fact and conclusions of law embodied in an opinion filed on October 24, 1983 and reported at 572 F.Supp. 1561 (D.N.J. 1983), (J.S.A. 62a-100a), the district court issued a decision granting plaintiffs' application for an order permanently enjoining the implementation of the MOS and declaring it unconstitutional on its face and as applied.[6] (J.S.A. 101a). Among other things, the district court found that the MOS "does not have a bona fide secular purpose and, in fact, has a religious purpose." (J.S.A. 94a). Moreover, the court concluded that the MOS "advances religion . . . by mandating a period when all students and teachers must assume the

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[6] Despite its opinion, the order entered by the district court failed to provide for a permanent injunction against implementation of the MOS, but instead merely declared the MOS unconstitutional. (J.S.A. 101a).

traditional posture of prayer of some religious groups." (J.S.A. 94a). Accordingly, the district court concluded that the MOS was unconstitutional because it lacked an "overwhelmingly obvious and important secular purpose." (J.S.A. 94a), it had the effect of both advancing and inhibiting religion (J.S.A. 94a-95a) and that implementation of the MOS would cause "divisiveness among and between religious groups." thereby causing governmental entanglement with religion. (J.S.A. 98a).

C. Decision of the Court of Appeals

Following briefing, the court of appeals (panel composed of Circuit Judges John Gibbons and Edward Becker and District Judge Marvin Katz, sitting by designation) heard oral argument on October 26, 1984. In June of 1985, the panel requested that the parties submit supplemental letter briefs commenting upon the effect, if any, that this Court's intervening decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985), had upon the issues then pending before the panel. After receipt of the parties' respective submissions, the panel ordered reargument on August 13, 1985.

On December 24, 1985, a divided panel affirmed the district court's conclusion that the MOS was unconstitutional. Judge Gibbons, writing for the majority, sustained the district court's conclusion on a narrower ground, and by a markedly different analysis, than that employed by the district court. In the process, the majority opinion rejected the district court's analysis under both the "effect" and "entanglement" prongs, (J.S.A. 16a-22a) and rested its decision *solely* on its interpretation of this Court's test under the "purpose" prong. (J.S.A. 23a-30a).

Circuit Judge Becker, in a dissenting opinion, sharply broke with the majority over its interpretation of this Court's "purpose" test and concluded that the MOS was

constitutional. (J.S.A. 31a-60a). After grouping the "evidence" presented to the district court into five categories: "testimony of three witnesses who were present at legislative hearings; newspaper accounts of the hearings; evidence of the perceptions of various citizens and citizens' groups of New Jersey about the statute's purpose; expert testimony about the pedagogical value of the statute; and seventeen prior bills proposing moments of prayer or moments of silence," and then engaging in a thorough review of this so-called evidence, Judge Becker concluded that "none of the evidence on which the plaintiffs rely is sufficient, separately or cumulatively, to prove an absence of any secular purpose behind the statute." (J.S.A. 58a). Indeed, Judge Becker noted that even the testimony of plaintiffs' witnesses concerning statements purportedly made by some legislators during hearings on the MOS was "equivocal because each of the witnesses also testified to legislators' statements that the statute had a secular purpose." (J.S.A. 48a-49a).

Judge Becker further disagreed with the majority analysis on the grounds that in reaching its conclusion that the MOS lacked a secular purpose, the majority had: (1) either applied the incorrect standard of review in contravention to this Court's decision in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (J.S.A. 44a-47a) or (2) even assuming a more deferential standard of review was applicable, the majority had inexplicably ignored sufficient relevant evidence in the record which revealed that the district court had clearly erred in finding that the MOS had no secular purpose. (J.S.A. 48a-49a).

SUMMARY OF ARGUMENT

This case involves a determination of whether New Jersey's moment of silence statute, which requires that all

principals and teachers in each public school in New Jersey "permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual students, before the opening exercises of each school day for quiet and private contemplation or introspection," violates the First Amendment's prohibition against the enactment of a "law respecting an establishment of religion." However, the issues presented go far beyond one state and one statute,[7] and raise substantial questions in the area of First Amendment Establishment Clause jurisprudence as well as the important issue of the proper standard and scope of review to be applied by federal appellate courts in such cases.

Appellants believe that, in invalidating a neutral statute which is facially and operationally constitutional, both the district court and court of appeals majority fundamentally erred in interpreting and applying this Court's teachings under the purpose prong of its Establishment Clause test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Given the statute's facial and operational neutrality towards religion, the Legislature's provision for a one minute period of silence to be observed by public school students in New Jersey, at the commencement of the school day, does not run afoul of the Constitution.

A. JUSTICIABILITY ISSUE. Alan Karcher, the Speaker of the 200th New Jersey General Assembly and Carmen Orechio, the President of the 200th Senate, who both are presently members of the 202nd New Jersey Legislature, have standing, individually and as representatives

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[7] In *Wallace v. Jaffree*, 472 U.S. at 70 n.1 (1985) (O'Connor, J., concurring), it was noted that New Jersey and some 24 other states have enacted statutes which "permit or require public school teachers to have students observe a moment of silence in their classrooms."

of the majority of the 200th Legislature, to prosecute this appeal. Messrs. Karcher and Orechio intervened below as full parties, as well as in their capacities as representatives of the majority of the 200th Legislature, to defend the MOS law which had been abandoned by the state executive branch and left defenseless against constitutional attack by the named party-defendants. Messrs. Karcher and Orechio have continued to act as the representatives of the 200th Legislature throughout the entire course of this litigation, and their present interests in representing that legislative majority are identical, if indeed not enhanced, to the interests they possessed at the time of the original intervention in this case. As proper parties in the court of appeals, Messrs. Karcher and Orechio and, through them, the 200th Legislature have statutory authority to seek review in this Court under 28 U.S.C. § 1254(b).

In their motion to dismiss or affirm, appellees contend that the current New Jersey Legislature, the 202nd, is the "sole agency who could have processed this appeal." (Mot. to Dism. or Aff. at 3). Since the leadership of that body has decided not to participate in this appeal, appellees reason that the current Legislature's withdrawal leaves this Court without a justiciable issue. However, since the current Legislature did not enact the MOS statute, it has no authority to abate the appeal. The preferences of its current presiding officers are insufficient and ineffective to withdraw this appeal.

B. ESTABLISHMENT CLAUSE ISSUE. New Jersey's MOS statute presents for review a permissive and facially neutral statute, the constitutionality of which this Court has not heretofore passed upon. In *Wallace v. Jaffree*, six members of this Court strongly suggested that a "straightforward" moment of silence statute would pass muster under the First Amendment, although the issue was

not then before the Court for decision. The New Jersey MOS statute places that issue squarely before this Court for decision.

The court of appeals panel was unanimous on a number of issues, including its views: that the MOS was "permissive only" as to student participation (J.S.A. 15a; 31a); that the district court's analysis under "entanglement" was contrary to this Court's recent pronouncements in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Mueller v. Allen*, 463 U.S. 388 (1983) (J.S.A. 17a; 31a), and; that even if the MOS was viewed as an accommodation to religion, the "effect" of the statute would not be to inhibit or advance religion. (J.S.A. 18a; 31a). However, it sharply divided over the proper mearing and application of this Court's Establishment Clause "purpose" inquiry. The majority concluded that even though it would not sustain a finding that the statute's purpose was to encourage prayer over other alternatives (J.S.A. 29a), it was constrained to "accept" the trial court's finding that the Legislature's purpose in enacting the MOS was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day." (J.S.A. 27a-28a). According to the majority, in affirming the district court, it was guided by this Court's decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). (J.S.A. 29a-30a).

Circuit Judge Becker's dissent carefully outlined a purpose analysis which had no common features with either the majority or the district court's approach. Applying that analysis, Judge Becker detailed why the trial court's finding that the MOS lacked a secular purpose was "unsupportable" under either a plenary review or under a

more deferential standard, as had been employed by the majority under FED. R. CIV. P. 52(a). (J.S.A. 44a-60a).

The narrow acceptance by the court of appeals majority of the trial court's finding of no secular purpose incorporates (albeit in some respects *sub silentio*) a ratification of a host of substantial and fundamental errors in understanding and implementing a plethora of this Court's Establishment Clause decisions. For example, the Third Circuit majority opinion, in affirming the district court's conclusion, ratifies the trial court's unexplained rejection of a number of this Court's decisions validating the concept of a "plausible secular purpose"; sanctions the trial court's errant inquiry into subjective motives of legislators; validates the trial court's rejection of fundamental presumptions and rules of statutory construction; endorses the trial court's acceptance and reliance upon wholly inadmissible hearsay; and approves the trial court's utilization of constitutionally irrelevant evidence to question the wisdom of the New Jersey Legislature's action in enacting the MOS.

The constitutionality of the MOS is settled under the decisions of this Court, because the act has a legitimate secular purpose of providing for a transition period at the commencement of the school day, a purpose which is strongly supported by the act's expressed language. Judge Becker, in dissent, compellingly set forth the reasons why the MOS is constitutional.

C. STANDARD OF REVIEW ISSUE. The panel majority's unexplained application of the "clearly erroneous" standard of review is in clear conflict with this Court's decision in *Bose Corp. v. Consumers Union*, and is logically inconsistent with its own conclusions as to the insufficiency of the trial court's determinations under the "effect" and "entanglement" prongs of this Court's Estab-

lishment Clause test. The court of appeals majority ignored the message of this Court that, in cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record. The inexplicable application of the wrong standard of review was error compounded by a misapplication of even that standard, and unless corrected will serve to foster additional errors in the understanding and application of not only this Court's decision in *Bose,* but the traditional standard of review provided by FED. R. CIV. P. 52(a).

ARGUMENT

I. THERE EXISTS ON THIS APPEAL A JUSTICIABLE CASE OR CONTROVERSY.

Distilled to its essence, the jurisdictional question presented is whether Alan Karcher, the Speaker of the General Assembly, and Carmen Orechio, the President of the Senate of the 200th Legislature of the State of New Jersey, have standing to prosecute an appeal to this Court, where:

> (1) Karcher, Orechio and the Legislature which enacted the MOS were required to intervene below by reason of the failure of the state executive branch to defend the laws of the State; and
>
> (2) But for these parties' active intervention below, there would have been no participating party-defendant and, therefore, no possibility of an adjudicatory trial on the merits; and
>
> (3) Where the successive Legislatures of the State of New Jersey have taken no official action of any kind to moot the controversy or to defeat this appeal; and
>
> (4) Where the issues raised by this case and this appeal involve, not merely the constitutional validity of the subject statute, but also critical, constitutionally-based questions as to the proper and per-

missible scope and manner of review by the federal courts as to the actions of the 200th Legislature.

(A) Alan Karcher, Carmen Orechio and the 200th Legislature Have An Abiding and Continuing Interest in the Subject Matter of this Case Sufficient to Sustain Standing to Prosecute this Appeal.

Messrs. Karcher, Orechio and, through them, the 200th Legislature were unquestionably parties to this case.[8] That body intervened, through its presiding officers, Karcher and Orechio, when it became apparent that the executive branch had seen fit to abandon the law—a law which, absent legislative intervention, would be left defenseless against constitutional attack. The district court granted the intervention by Karcher and Orechio and their respective legislative houses which had passed the enactment; save for some quibbling about the discovery implications of the intervention, the plaintiffs consented to the intervention.[9] The interests of the intervenors in defending the legislation orphaned by the executive branch has not changed since the time of intervention.

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[8] The New Jersey Constitution provides that:

> Each legislature shall be constituted for a term of 2 years beginning at noon on the second Tuesday in January in each even numbered year. . . .

N.J. Const. (1947), art. 4, § 1, par. 3. The 200th, 201st and 202nd New Jersey Legislatures commenced on January 12, 1982, January 9, 1984, January 14, 1986, respectively.

[9] It is certainly anomalous that the appellees, who undoubtedly initially welcomed intervention by appellants so that the matter could proceed to a trial on the merits on a truly adversarial basis, now, in order to preserve a questionable result below, complain that the selfsame parties should be debarred from concluding the adjudicatory process by way of a full range of appeal with respect to an issue which all parties have agreed is of primal public importance. Unlike the more typical situation of intervention by an essential stranger to the legislative process, here active participation by the appellants was a prerequisite to the matter proceeding to a plenary trial on the merits.

Any notion that Messrs. Karcher and Orechio were simply in this case in their official capacities is inconsistent with the limited power and authority provided to the presiding officers of the Legislature pursuant to its rules. Examination of the Rules of the General Assembly and Senate reveals that the duties of the speaker and president are administrative in nature and do not empower them to institute litigation on behalf of their respective bodies.[10] Accordingly, Karcher and Orechio could have only intervened with and for the 200th Legislature, of which body they were presiding administrative officers.[11]

Messrs. Karcher and Orechio's intervention as full parties and as representatives of the majority which enacted the law over a gubernatorial veto is reflected in the transcript of the intervention hearing before the district court on January 18, 1983. (Mot. to Dism. or Aff. App. 11a). At that time, counsel who appeared on behalf of the intervenors advised the district court that he was moving on behalf of Karcher and Orechio as presiding officers "to be made a party, direct defendant in this matter." (Mot. to Dism. or Aff. App. 13a). The intervention of Karcher and Orechio as party-defendants was granted by the court and the intervention order reflects the intervention of those

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10 The Rules of the General Assembly delineate the following administrative duties to the speaker: chair meetings of the assembly; put questions before the assembly; appoint committees; prepare a Calendar of Bills and Resolutions and sign certificates as to passage by the assembly of all acts and joint resolutions. Fitzgerald, *Legislative Manual, State of New Jersey* (1986), at 358-360. The Rules of the Senate provide likewise. *Id.* at 319-321.

11 If the appellees' challenge to Karcher and Orechio's standing to appear with and for the legislative body that enacted the MOS is to be credited, then, it would seem necessary as a logical consequence, that the appropriate remedy for this Court is, not merely to dismiss the appeal, but rather to vacate the entirety of the proceedings below on the ground that there never was a proper adverse party-defendant.

two individuals, as well as the entire collegial bodies of the General Assembly and the Senate. (J.A. 53).

Messrs. Karcher and Orechio continued to act as the representatives of the 200th Legislature throughout the extended litigation before the court of appeals.[12] They continue to act in the same role on this appeal because their present interest in representing the majority that enacted the statute is identical to the interest they possessed at the time of intervention.[13] Indeed, who other than the presiding officers and leaders of the majority of the Legislature whose enactment is under constitutional attack are more proper representatives of that body?[14]

Appellees argue that this is an official capacity suit and that the current Legislature is the only real party-in-interest. (Mot. to Dism. or Aff. at 2). Appellants contend that this is not an official capacity suit and that Karcher and Orechio have a real and present interest in

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12 At the time that the court of appeals heard oral argument in this case, *Wallace v. Jaffree* was pending before this Court. Accordingly, the Third Circuit reserved decision (after initial oral argument on October 26, 1984) pending the disposition of *Jaffree*. Reargument did not occur until August 13, 1985 and the court of appeals decision was rendered on December 24, 1985. Had this matter proceeded in the court of appeals without the resulting protracted delay, it might have reached this Court before Messrs. Karcher and Orechio relinquished their titles of speaker and president, in which case the standing issue might not have arisen.

13 Mr. Karcher's current interest in representing the majority that passed the law is reflected in his letter to appellants' counsel of record dated April 29, 1986. In that letter, Mr. Karcher advised counsel that he was the only valid representative of the legislative body that enacted the statute. (Mot. to Dism. or Aff. App. 6a).

14 While arguably a motion for substitution of a party for purposes of prosecuting an appeal could have been made pursuant to Supreme Court Rule 40.1, such a motion would have been a redundancy for Messrs. Karcher and Orechio who already were joined as intervenors-defendants. Indeed, it would seem technically incorrect to require substitution of one who already is a party.

maintaining this suit, notwithstanding the loss of their titles of "speaker" and "president."[15]

By letters dated April 21, 1986 and April 29, 1986 to appellants' counsel of record, Mr. Hardwick and Mr. Russo purported to direct counsel to withdraw this appeal. (Mot. to Dism. or Aff. App. 4a; 5a). Their correspondence, however, does not indicate by what authority their directives were made. Indeed, they could not do so because the present presiding officers of the General Assembly and Senate have no such authority—legislative, constitutional or otherwise—to abate an appeal undertaken on behalf of the majority of the prior Legislature which passed the MOS.

Appellants agree with appellees that "[i]t is up to the legislature to determine when to defend its own interests." (Mot. to Dism. or Aff. at 13). The Legislature that voted for the law demonstrated its desire to defend the law by intervening. Moreover, there is nothing in the record to indicate that its interest in maintaining the defense no longer exists. Certainly, Messrs. Russo and Hardwick cannot speak on behalf of the parties who intervened below

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[15] It is evident that official-capacity suits involving administrative or executive persons are materially different from the situation presented herein. Where an executive branch party-defendant is succeeded in office, he generally has no continuing stake in the controversy but his successor has the viable ongoing interest in the outcome, as it will affect the scope or nature of his functions. See, for instance, *Acheson v. Fujiko Furusho*, 212 F.2d 284 (9th Cir. 1954); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 1960, at 570-572 (1986). In the legislative context, the parallel fails. The initial Legislature passes the legislation and the successor Legislature has no continuing function with respect thereto, unless and until it chooses to act, by way of repeal or modification. Given that successive Legislatures in New Jersey are separate and independent bodies, *Ex parte Hague*, 105 N.J. Eq. 134, 147 A. 220 (1929), and do not reenact prior statutes, there is simply no logical basis on which to assume that a successive Legislature has a greater or superior stake in the outcome of a legislative challenge than the Legislature that actually passed the statute under review.

in the absence of an expression by those parties indicating a desire to withdraw the appeal.[16]

Inasmuch as the current Legislature neither enacted the MOS statute nor intervened in this action, it equally lacks the power to moot this appeal by simply expressing, through its leaders, a desire not to join as an appellant. If the current legislative body is opposed to the MOS, its remedy is to repeal the statute.[17] Since the current Legislature has not chosen to do so, there is no basis from which to conclude that the position of the current Legislature (as opposed to its leadership) with respect to this appeal differs in any way from that of the majority that enacted the statute. In any event, the interest of the presently constituted Legislature never can rise to the level of the interest of the body that voted for the law. It was the vote of the prior Legislature, not the current one, that was,

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16 Indeed, even the current leaderships' positions may not truly reflect their own legislative judgments. Both Assemblyman Hardwick and Senator Russo, as members of the 200th Legislature, initially voted to enact the MOS (J.A. 384; 387) and Mr. Russo voted to override the Governor's subsequent veto. (J.A. 389). Even assuming their individual judgments have changed and each no longer supports the legislation, they are incapable of undoing their earlier votes through the method they have chosen in this action. Whether they have changed their minds or not, they are, in their current capacities, strangers to this appeal who cannot repeal the enactment nor moot this appeal by dint of their individualized expressions even as the Speaker of the current Assembly and the President of the current Senate.

17 This is not to say that the current Legislature could not be a proper party to this action; the issue presented, however, is whether it is the *only* proper party defendant. For the reasons expressed herein, it is respectfully submitted that the enacting Legislature has the paramount interest in the legislation and in the integrity of the legislative process under court scrutiny. Indeed, in this case, the current Legislature has placed itself in a position no different from that of the executive branch in New Jersey in the early stages of this proceeding—sitting on the sidelines and taking no official action.

in effect, improperly negated by the lower courts' pronouncements of unconstitutionality.[18]

The instant case is readily distinguishable from those cases which address the standing to appeal of individual defendants in official capacity suits. In *Bender v. Williamsport Area School District*, — U.S. —, 106 S.Ct. 1326 (1986), this Court held that the school board member was sued in his official capacity and had no interest in the suit as an individual. In contrast, Messrs. Karcher and Orechio were not sued in their official capacity. Rather, they intervened to represent the majority whose law was challenged. Moreover, while the school board member in *Bender* was found to have no personal stake in the outcome of the suit, the interests of Messrs. Karcher and Orechio as members of the majority who voted for the law still exist notwithstanding the subsequent loss of their presiding officer titles. Finally, *Bender* is inapposite because there the school board voted to forego the appeal, while here there was no such vote by the affected legislative body. Therefore, the proposition that "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take," *id.* at 1333, simply is not applicable in the instant case.

Similarly, the Court need not be concerned with the holdings of cases involving the standing of individual legislators to challenge statutes passed over their objection,[19] cases involving the standing of private individuals to per-

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[18] Similarly, the decisions of the district court and the court of appeals majority effectively nullified the vote of each individual legislator, such as that of Alan Karcher and Carmen Orechio, who voted for the passage of the law.

[19] *See, e.g., Koriath v. Briscoe*, 523 F.2d 1271 (5th Cir. 1975); *Poovey v. Edminsten*, 526 F.Supp. 759 (E.D.N.C. 1981) (state legislator has no standing to challenge constitutionality of statute for which he did not vote).

fect an appeal which a state has decided to forego[20] or cases involving intervention by the executive branch.[21] This case does not involve a challenge by a legislator who voted against an enactment, nor an individual with no direct interest in the outcome of the litigation. Likewise, this suit is not concerned with intervention by the executive branch. The unique facts presented here stem from the peculiar turn of events which occurred from the moment the law was enacted. The named defendants abandoned the law, leaving its defense to the legislative intervenors. The disposition of this matter was delayed in the court of appeals, and during that period, a successive Legislature was elected and convened, wherein appellants Karcher and Orechio were no longer presiding officers of the Legislature, though they remain legislators representing the same districts they represented during the term of the 200th Legislature. The new political leaders decided that *they* had no desire to join in the appeal. Yet throughout the entire course of these events, the legislation enacted by the majority was under attack and the interests of the majority and its representatives, Karcher and Orechio, remain unchanged.

The district court properly permitted the Legislature and its representatives to intervene to defend its legislation. The interests of the Legislature that enacted the law, and its representatives, Karcher and Orechio, have not dissipated through the political changes which occurred during the course of this litigation, and in fact are identical to those interests which led to intervention. Since the interests of

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20 *See, e.g., Diamond v. Charles,* — U.S. —, 106 S.Ct. 1697 (1986) (private individual had no standing to perfect an appeal which State of Illinois declined to take).

21 *See, e.g., Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703 (1985) (acknowledging Connecticut's right to intervene to defend constitutionality of statute).

the parties are in no way meaningfully different on this appeal, this Court is presented with a live case or controversy and has jurisdiction to decide this appeal.

(B) As Proper Party-Defendants Below, Alan Karcher, Carmen Orechio and the 200th Legislature Have a Statutory Right to Maintain this Appeal.

No issue has been raised, much less a challenge made, contesting the undoubted standing of Messrs. Karcher and Orechio and the 200th Legislature in the court of appeals. In attacking the constitutionality of the MOS, the appellees called into question the very process by which the MOS was enacted and, in so doing, took aim at comments made by a handful of legislators for the putative purpose of establishing an illicit motivation on the part of the Legislature, as a whole, in passing the MOS. Clearly, the magnitude of the appellants' interests in defending the integrity of the legislative process was sufficient to allow for their intervention in the district court. Indeed, as is readily apparent from the oral argument on the intervention application, the appellees openly welcomed Karcher and Orechio and the 200th Legislature into the case. (Mot. to Dism. or Aff. App. 11a). In this Court, the appellants have the same interests and the same stake in the outcome of the litigation as they had in the courts below.

As proper parties in the court of appeals, Messrs. Karcher and Orechio, and, through them, the 200th Legislature have statutory authority to seek review in this Court under 28 U.S.C. § 1254(b), which authorizes an appeal to this Court "by a *party* relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, . . . of the United States" (emphasis added). Consequently, since Karcher and Orechio and the 200th Legislature were proper parties in the court of appeals, their statutorily authorized appeal has brought this case to this Court. *See, e.g., Director, Office of Workers' Compensation Programs,*

etc. v. Perini North River Associates, 459 U.S. 297, 304 (1983); *Diamond v. Charles,* — U.S. —, 106 S. Ct. 1697, 1708 (1986) (O'Connor, J., concurring).

(C) The Action of the Court Below, in Intrusively and Incorrectly Probing the Legislative Process by Which the MOS Was Enacted and by Holding the Law to be Invalid, Constitutes "Judicial Nullification" so as to Give Standing to the Majority of the 200th Legislature to Seek Appellate Review.

The right of the 200th Legislature to intervene herein was analogous to the recognized right of Congress to intervene when the executive branch declines to defend the validity of a statute. *See INS v. Chadha,* 462 U.S. 919, 940 (1983); *Ameron v. U.S. Army Corps of Engineers,* 787 F.2d 875, 888 n.8 (3d Cir. 1986). While that right alone was sufficient to initially confer standing on the legislative intervenors herein, an additional and distinct injury in fact has been visited upon them by the district court's erroneous inquiry into the legislative process and subsequent finding of unconstitutionality as to the MOS statute. That court's impermissible intrusion into the legislative process essentially nullified the votes of the majority of the 200th Legislature who supported the statute's enactment. The injury to the majority of the Legislature caused by the judicial nullification of their votes is sufficient to satisfy the standing requirement of Article III.

This Court has recognized that legislators, whose votes are nullified through the improper actions of the executive branch, have standing to challenge those actions. *See Coleman v. Miller,* 307 U.S. 433 (1939). That case involved a resolution for the ratification in the Kansas State Senate of a proposed amendment to the federal Constitution. Of the forty senators who voted on the resolution, twenty voted in favor of its passage and twenty voted against it. The Lieutenant Governor, who was the

presiding officer of the Senate and the individual empowered to break a tie vote, voted in favor of the resolution. Thereafter, twenty-one members of the Senate, including the twenty who voted against the resolution, and three members of the State House of Representatives, brought suit to challenge the authorization of the Lieutenant Governor to cast the tie-breaking vote. *Id.* at 436. The Supreme Court of Kansas upheld the right of the Lieutenant Governor to cast the deciding vote. *Id.* at 437.

On appeal, this Court rejected respondent's argument that the case involved "a mere intraparliamentary controversy," stating:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. *We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.*

Id. at 438. (emphasis added).

Here, of course, there was no explicit claim of illegal executive action as such, although the unique facts presented to the district court at the time of intervention related to the announced intention and actual failure of the executive branch to defend the law before the district court.[22] Thereafter, as a result of the district court's errant approach, there arose an issue of the propriety of judicial interference with the functional integrity of the legislative enactment process.

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[22] By failing to defend, the executive branch party-defendants in essence sought to give effect to the previous gubernatorial veto which the 200th Legislature had addressed through its actions on December 13, 1982 and December 16, 1982 when each house independently voted to override the veto. It is clear that this total absence of a party-defendant who would vigorously defend the law was the primary reason the district court properly permitted appellants' intervention. *See, e.g.*, Fed. R. Civ. P. 24(a)(2).

In *McRae v. Mathews,* the District Court for the Eastern District of New York addressed the issue of judicial nullification as an independent basis for intervention of members of Congress at the trial level. 421 F.Supp. at 533 (E.D.N.Y. 1976), *appeal dismissed, Buckley v. McRae,* 433 U.S. 916 and *vacated, Califano v. McRae,* 433 U.S. 916 (1977), *reh'g denied, Califano v. McRae,* 434 U.S. 881 (1977) and *on remand, McRae v. Califano,* 491 F. Supp. 630 (E.D.N.Y. 1980), *rev'd, Harris v. McRae,* 448 U.S. 297 (1980), *rehearing denied, Harris v. McRae,* 448 U.S. 917 (1980). In that case, plaintiffs challenged the constitutionality of a provision of the Federal Appropriation Act denying federal medicaid reimbursements for elective abortions. Despite the existence and participation of an executive branch party-defendant (Secretary of H.E.W.), two United States Senators and one member of the House of Representatives sought to intervene "in support of the legislation in their interest as Members of Congress seeking to protest their votes from judicial nullification . . . . " 421 F.Supp. at 540.

While the district court recognized the right of legislators to sue where the correctness of the process of enactment is challenged, it declined to extend that right to a situation where the sole challenge involves the constitutional validity of a properly enacted law. *Id.* at 540. In so doing, the district court expressed its concern that:

> To grant intervention on the ground of the members' participation in enacting the law would involve accepting as a principle that each member of the Congress has an interest to intervene in every case in which the substantive constitutionality of a provision in a federal enactment was drawn into question or, indeed in which the interpretation of a federal statute was in question.

Id. (citation omitted).

This Court has long endeavored to apply narrowly the principle of standing to the precise facts of each case. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 489 (1982). The *McRae* court's concern that recognition of a legally cognizable interest based upon prospective judicial nullification would result in a plethora of legislator interventions is unfounded here; the interest of the 200th Legislature is not limited merely to the right to defend the constitutionality of a properly enacted statute, but now also involves an interest derived from the injury done to the legislators' votes as integral to the enactment process. The facts of this case are qualitatively different from *McRae.*

Unlike *McRae,* the facts presented herein are unique and unlikely to recur. Here, there is no prospective quality to the appellants' claim to standing on the basis of the lower court's judicial nullification of their actions. Appellants have shown that the district court's invalidation of their "purpose" through examination of their purported subjective motivations, as well as an improper re-evaluation of the wisdom of their activities, impermissibly impugned and nullified their legitimate legislative action. Thus, the district court's erroneous actions directly call into question the "efficacy of the legislator's vote as a vote to be counted in the legislative process." *McRae v. Mathews,* 421 F.Supp. at 540.

The injury sustained by the appellants as a result of the lower court's improper judicial nullification of their votes is sufficient to satisfy the standing requirements of Article III. Here, the appellants have suffered injury as a result of the district court's impermissible inquiry into the legislative process. *See Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979). That injury is more than a "generalized grievance" shared by the public. *Warth v. Seldin,* 422 U.S. 490, 499 (1975); *see Gladstone,*

441 U.S. at 100. It is an injury unique to the appellants. Accordingly, the appellants have standing to litigate this matter based upon the judicial nullification of their votes.

II. THE COURT OF APPEALS MAJORITY ERRED AS A MATTER OF LAW IN HOLDING NEW JERSEY'S MOMENT OF SILENCE LAW UNCONSTITUTIONAL BASED UPON A FINDING THAT THE MOS LACKED ANY PLAUSIBLE SECULAR PURPOSE.

Any legal analysis of the subject statute must start with the indisputable fact that it is constitutionally neutral on its face—it neither requires nor implicates any manner of religious exercise. In order to skirt this seemingly insurmountable legal barrier, the district court engaged in a free-wheeling taking of bits and shards of "evidence" —including selected newspaper clippings and extra-legislative statements by a handful of legislators—leading to an apparent conclusion as to a purported hidden subjective religious motive by the sponsors, which, in turn, was then attributed to the entire New Jersey Legislature. On this jerry-built basis, the MOS was found by the courts below to be unconstitutional.

(A) The Constitutional Standard: The Three-Part Test

In analyzing whether the MOS violated the proscription of the Establishment Clause, the courts below purported to be guided by the three-part test first enunciated by this court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, this Court stated:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion."

Id. at 612-613.

To withstand attack under the Establishment Clause, the challenged state action must satisfy each of the three criteria. The court of appeals had no difficulty in reversing the district court's conclusion that the MOS failed both the "effect" and "entanglement" prongs of the *Lemon* test, but the court of appeals majority erred in ratifying the district court's approach that to satisfy the secular legislative purpose requirement there must be an "overwhelmingly obvious and important secular purpose" (J.S.A. 91a), and thereby erroneously concluded that the MOS had no sufficient secular purpose.

In analyzing the MOS under the purpose prong of *Lemon*, while traveling different routes, both the majority of the court of appeals and the district court fundamentally erred in interpreting and applying this Court's "purpose" requirement. The panel majority utterly failed to engage in any meaningful analysis of this Court's prior opinions addressing "purpose", and instead ultimately abdicated its responsibility by accepting without question "the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious."[23] (J.S.A. 27a). Curiously, the majority did not in any way question the accuracy of Judge Becker's observation in his dissent, that "[t]he evidence simply does not demonstrate that the statute lacks any secular purpose." (J.S.A. 59a). Judge Becker's analysis of "purpose" was very different from

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[23] It would be sophistic to conclude that this statement in the trial court's opinion was, on the basis of this record, a factual finding sufficient to prevent review by the appellate courts. At a minimum, it is a mixed question of fact and law. Given, however, the constitutional issues inherent in the merits of this case and further recognizing that the manner and scope of judicial review herein employed raises further constitutional concerns, it is respectfully suggested that any such "finding" should be subject to appellate circumspection. Cf. *Bose Corp. v. Consumers Union*, 466 U.S. 485 (wherein this Court exercised plenary review of lower court's finding of actual malice in libel case).

that of the majority and, it is submitted, was consistent with and faithful to this Court's prior instructions concerning the proper meaning and application of the purpose prong. (J.S.A. 43a-60a).

(B) The Majority of the Court of Appeals Erred in its Interpretation and Application of the Purpose Prong of this Court's Tripartite Establishment Clause Test by Accepting and Endorsing the Basis by Which the District Court Determined that the MOS Lacked any Plausible Secular Purpose.

As pointed out above, the court of appeals decision, validating the district court's "factual" finding of no secular purpose, incorporated a number of significant errors made by the district court in arriving at that conclusion. In conducting its purpose examination, the district court purported to peer behind the face of the MOS in order to reject: (1) the explicitly neutral language of the statute, and (2) the plausible secular purpose that was both evident from the face of the statute and confirmed by the proofs presented by the Legislature. (J.S.A. 90a-91a).

On the basis of its conclusion that the MOS had "no overwhelming secular purpose" (J.S.A. 91a), the district court engaged in a wholly unprecedented judicial search for legislative purpose in which it entertained evidence relating to the wisdom and necessity of the MOS. (J.S.A. 83a-85a; 87a-88a). In so doing, the court went beyond its proper judicial role of evaluating and deciding the legal issues presented in accordance with the objective evidence consisting of the plain language of the law, the plausible secular purpose established by the Legislature, and the appropriate constitutional standard.[24]

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[24] Under the guise of assessing legislative purpose, the district court made assumptions outside the record concerning

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Instead, the district court purported to make findings concerning issues in an area long recognized as not only being beyond its competence and authority (*see San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31-32 (1973)) but, moreover, totally irrelevant to a determination whether the MOS satisfied the appropriate constitutional standards. *Zorach v. Clauson*, 343 U.S. 306 (1952).

The evidence at trial presented by the Legislature established: (1) a plausible pedagogical purpose for the MOS (J.A. 352-361; J.S.A. 83a), and; (2) empirical data which established that a moment of silence exercise in operation actually accomplished the identified pedagogical purpose. (J.A. 313-326). Though none of plaintiffs' witnesses had either observed or participated in a moment of silence exercise, plaintiffs presented witnesses who opined that a moment of silence would have marginal educational utility at best (J.A. 188; 219) and testimony from educational officials who believed that there was no educational value to a moment of silence exercise. (J.A. 238-239; 303-304).

The district court resolved the differences in favor of the plaintiffs, by relying upon plaintiffs' proofs as to the

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the history of school prayer in New Jersey (J.S.A. 86a-87a) and New Jersey demographics (J.S.A. 85a); permitted the introduction of legislation considered by prior independent Legislatures (J.S.A. 86a); received the selected hearsay utterances of a handful of legislators who spoke during (and outside) legislative committee meetings and floor debates leading to the enactment of the MOS (J.A. 368-372; App. Vol. V); and imposed a new requirement that, in order for the court to accept the plausible secular purpose identified by the appellants at trial, that purpose must be shown to have been specifically and explicitly discussed and considered by the Legislature when it enacted the MOS. (J.S.A. 83a-84a; 87a-88a). In short, what the district court imposed upon the Legislature, in effect, was a duty to establish the "actual subjective intent"—or perhaps more accurately, the "collective subjective motive"—of the legislators who enacted the MOS.

wisdom of the moment of silence. To buttress its conclusion, the court pointed to the purported failure of the Legislature to present evidence that schools were unable to accomplish the same purpose through other mechanisms. (J.S.A. 87a). In relying on such considerations, the court violated one of the most settled rules of constitutional adjudication—provided an enactment is within the constitutional power of a Legislature, a belief that an act of legislation is ineffective or unnecessary is a legally insufficient and improper basis upon which to conclude that the act was unconstitutional. *See Schweiker v. Hogan*, 457 U.S. 569, 589 (1982); *Daniel v. Family Secur. Life Ins. Co.*, 336 U.S. 220 (1949). As Justice Douglas pointed out in *Zorach v. Clauson*, 343 U.S. at 314, the rule is no different in an Establishment Clause case:

> This program may be unwise and improvident from an educational or community viewpoint. That appeal is made to us on a theory previously advanced, that each case must be decided on the basis of 'our own prepossessions.' See *Illinois ex rel McCollum v. Board of Education*, supra (333 U.S. p.238, . . .). Our individual preferences, however, are not the constitutional standard.

This intrusive and unwarranted perspective of the district court as to the necessity, *vel non*, of the MOS—ultimately translating into an apparent cynicism as to the personal philosophical and subjective motives of the individual sponsoring legislators—runs throughout the proceedings below. Eventually, it leads to the imposition by the district court of its view as to what the duly elected legislative branch should or should not do as opposed to what it constitutionally can or cannot do. This new standard of "scrutiny" has never been sanctioned by this Court.

While the district court paid lip service to the Legislature's position that "constitutional analysis of legislative

purpose does not involve a judicial inquiry into supposed illicit legislative motive" (J.S.A. 91a), it nonetheless engaged in a wholly unprecedented inquiry into the alleged subjective motivation of some legislators in sponsoring the MOS and concluded from incomplete and highly incompetent fragments of "evidence" that the "history of this kind of legislation and the circumstances of the adoption of this particular bill point inescapably to an essential religious purpose." (J.S.A. 91a-92a). To reach this bald conclusion, the court relied not only on the fragmentary hearsay utterances of a handful of legislators,[25] but considered, without any rational explanation as to their relevancy, items of legislation that had been introduced during sessions of prior independent legislatures. (J.S.A. 86a).

An examination of the district court's legal analysis reveals that the court had absolutely no precedential support for its unique procedure. Indeed, the only justification offered was a labored attempt to distinguish the case before it from the controlling principles enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). That distinction between "the motives and purposes of individual legislators and an institutional purpose" (J.S.A. 91a) was used by the district court as justification for its departure from the clear admonitions announced in *O'Brien*. As construed by the district court, *O'Brien* stood for the proposition that it was only where a statute on its face contained an "overwhelmingly obvious and im-

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[25] The New Jersey Legislature consists of two houses: an Assembly which has a membership of 80 Assemblypersons and a Senate which has a membership of 40 Senators. During the legislative process, the MOS was voted upon by as many as 74 Assemblypersons and 35 Senators. All told, the plaintiffs presented fragments of statements from 5 Assemblypersons and 11 Senators not all of whom even reportedly stated anything relevant. (App. Vol. V).

portant secular purpose" (J.S.A. 91a) that a court was prohibited from exploring subjective legislative motivations. In this regard, the district court was plainly wrong.[26] No such distinction was recognized by *O'Brien* nor has it been recognized by any court which the district court could identify.[27] Indeed, there is no such distinction.

The district court's misreading of *O'Brien* was carried forward and compounded by the majority opinion of the court of appeals. In the process, the clear instruction of this Court's decision in *O'Brien* was further confused and drained of meaning. As read by the court of appeals majority, *O'Brien* authorized the use of legislator statements (apparently from whatever source derived) whenever the court was required to determine legislative purpose. (J.S.A. 27a n.9). In arriving at this conclusion, the panel opinion misquotes the *O'Brien* opinion and, as pointed out by Judge Becker (J.S.A. 50a n.9). misreads the clear limitations identified in *O'Brien*. The uniquely limited circumstance in which the *O'Brien* Court would sanction such an inquiry has no application whatsoever to this Establishment Clause controversy. *Cf. Washington v. Davis*, 426 U.S. 229, 244 n.11 (1976); *Lynch v. Donnelly*, 465 U.S.

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[26] The analytical basis employed by the district court in applying its distinction is entirely circular. That is, the court reviewed and relied upon the individual "motive evidence" in order to conclude that the MOS lacked an "overwhelmingly obvious and important secular purpose" which in turn permitted it to escape the evidential limitations of *O'Brien*. Thus, it used the legally improper "evidence" in order to reach a legal/factual conclusion that it could consider the selfsame "evidence". Moreover, purporting to draw a distinction between "motives" and/or "purposes of individual legislators" and "institutional legislative purpose," it then used the former to prove the latter, thereby obliterating the putative distinction.

[27] This Court in *O'Brien* specifically rejected a similar argument that had been advanced on the basis of two of its earlier decisions, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *See United States v. O'Brien*, 391 U.S. at 384-385.

668 (1984). And even where such an inquiry might be authorized, there is absolutely no support for opening the evidentiary floodgate to accept the types of utterly unreliable hearsay that the district court considered. (App. Vol. V).

Starting as early as the decision in *Fletcher v. Peck,* 10 U.S. 87 (1810), wherein this Court refused to void the Georgia Legislature's sale of lands on the theory that its members were corrupted by impure motives in passing the legislation, it has always been well settled that judicial inquiry into subjective legislative motives represents an improper intrusion into the affairs of another branch of government which the courts should not undertake. In *McCray v. United States,* 195 U.S. 27, 56 (1904), it was noted that "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Accord, Arizona v. California,* 283 U.S. 423, 455 (1931) (in which Justice Brandeis cites a long list of cases holding that the courts may not inquire into the motives that induce legislative bodies to enact laws). The district court's procedure, as ratified by the court of appeals majority, is exactly the type of impermissible inquiry this Court clearly rejected in *O'Brien:*

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.

> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 383-384. *Accord, Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971).

The procedure adopted by the district court is totally inconsistent with this Court's pronouncements as to the judiciary's proper scope of review in determining the constitutionality of state legislation.[28] As Justice Black noted in *Palmer v. Thompson*, there is an element of futility in an approach which would invalidate a law on the basis of the illicit subjective motivations of its supporters.

> If, the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant government body repassed it for different reasons.

Id. at 225.[29]

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[28] The *O'Brien* analysis is particularly applicable to the district court's reliance upon prior legislative proposals (spanning 10 years) as constituting proof of an illicit subjective legislative motivation for the MOS. (J.S.A. 86a-87a). First, the district court failed to provide any rational way to determine how the acts of prior legislators and independent legislative bodies indelibly mark the subsequent activities of an independent legislative body. Secondly, even assuming *arguendo* that there were certain supporters of the prior legislation who also voted for the MOS, the district court failed to explain how it could determine that such legislators' subjective motives had remained stagnant. And finally, as made clear by *O'Brien*, even further assuming that the prior legislators who had supported the earlier legislation had maintained their subjective views (and that those views were clear) the district court failed to explain how those views could be imputed to the multitude of other legislators who voted for the MOS.

[29] The problem involved with judicial inquiries into legislative motives has been the subject of academic commentary.

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The district court's invasive inquiry in the instant case was completely contrary to all of the guidance that has been supplied by this Court and was clearly in error.

In affirming the district court's purpose finding, the court of appeals majority, *sub silentio,* endorsed the trial court's unprecedented purpose analysis. In so doing, the majority totally ignored this Court's teaching in *Mueller v. Allen,* 463 U.S. at 394-395, that the judiciary should be "reluctant to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

Moreover, in ratifying the district court's probing to find religious purpose—as opposed to accepting a clearly plausible secular purpose—the majority completely ignored expressions from members of this Court which support the proposition that a facially neutral moment of silence statute presumptively has a secular purpose. *See Abington School Dist. v. Schempp,* 374 U.S. 203, 281 (1963) (Brennon, J., concurring); *see also Wallace v. Jaffree,* 472 U.S. at 38; at 63 (Powell, J., concurring); at 72-73 (O'Connor, J., concurring).[30]

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See Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).* Professor Bickel observes that "it is simply unthinkable that members of legislative majorities should from time to time be subject to cross-examination . . . regarding their state of mind when they voted . . . ." Bickel, *supra,* at 215.

[30] Likewise, many constitutional scholars have suggested that moment of silence statutes are constitutional. *See* Tribe, *American Constitutional Law* § 14-6 at 829 (1978); Freund, *The Legal Issue, in Religion and the Public Schools* 23 (1965); Choper, *Religion in the Public Schools; A Proposed Constitutional Standard,* 47 *Minn. L. Rev.* 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 *Mich. L. Rev.* 1031, 1041 (1963).

Although the majority opinion acknowledges, as it must after *Jaffree,* that "in the abstract" the Supreme Court would uphold a statute such as the moment of silence (J.S.A. 26a), ultimately it concluded that the expressions of the various Justices in *Jaffree* did not provide a clear answer for the case before it. Instead, by accepting the district court's finding of no secular purpose, and by ignoring the clear guidance of this Court as to the acceptability of a "plausible" secular purpose to satisfy the "purpose" inquiry, the majority ironically concluded that its decision must be guided by *Estate of Thornton v. Caldor, Inc.* (a case decided principally under the effect prong) and invalidated the MOS as unconstitutional.[31]

Thus, despite its conclusion that the MOS is a neutrally worded statute which is facially and operationally constitutional (and could not be found to endorse prayer), the court of appeals nonetheless found that the MOS violated the Establishment Clause, solely by embracing the district court's "finding" that the law lacked a secular purpose. In so ruling, the court of appeals sanctioned not only the trial court's unjustified rejection of Supreme Court decisions endorsing the validity of a "plausible" secular purpose, but more importantly, approved the district court's unprecedented search for subjective legislator motive as an answer to the Supreme Court's "purpose" test.

In the end, both the court of appeals and the district court transmogrified this Court's "secular purpose" standard into "a subjective legislator motive" test—a test and standard that has never been recognized or announced by

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[31] In the process, the majority fails to mention, much less address, how it escapes the application of the presumption of constitutionality identified by Judge Becker in his dissent. (J.S.A. 38a-43a).

this Court.[32] *See McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring).

(C) Under a Proper Purpose Analysis, Giving Due Regard to all of this Court's Teachings Under the Establishment Clause, the MOS is Constitutional.

The forceful dissent of Judge Becker in the court of appeals explicitly found the MOS to be constitutional:

> In my view, a permissive and facially neutral statute such as the New Jersey moment of silence is presumptively constitutional; that the presumption is all the stronger when, as here, the enactment passes the entanglement and effects test of *Lemon* .... (J.S.A. 60a).

As pointed out by Chief Justice Rehnquist, the *Lemon* test's "secular purpose prong has proven mercurial in application because it has never been fully defined" nor has this Court ever "fully stated how the test is to operate." *Wallace v. Jaffree*, 472 U.S. at 108 (Rehnquist, J., dissenting). Despite this shortcoming, Justice Powell has observed that the *Lemon* standard itself is the "only coherent test a majority of the Court has ever adopted" in analyzing an Establishment Clause case. *Id.* at 63 (Powell, J., concurring). Indeed, in only two cases since enunciation of the tripartite test, has this Court resolved an Establishment Clause issue without applying the *Lemon* test. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982). In reviewing this

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[32] As a result of its reinterpretation of the MOS as a permissive statute, the panel majority devotes considerable time to the discussion of the concept of "accommodation." (J.S.A. 9a-15a). Ultimately, however, the majority recognizes that this characterization does not resolve the constitutional issue (J.S.A. 15a) and in the end the discussion of accommodation is essentially irrelevant to its determination under the purpose prong. It is beyond dispute, however, that if, as urged by the Legislature, the majority is wrong as to purpose, than its "effect" and "entanglement" analyses are nonetheless as valid for a statute with a secular purpose as for one viewed as an accommodation.

Court's Establishment Clause decisions, one thing is clear: the Court's purpose inquiry will start with the statute itself. In fact, the decisions of this Court reflect that generally the Court's examination of purpose has not strayed from the face of the enactment. *See, e.g., Committee For Public Education v. Nyquist,* 413 U.S. 756, 773 (1973) ("We need touch only briefly on the requirement of a secular purpose. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsecterian state interest."); *Sloan v. Lemon,* 413 U.S. 825, 829-830 (1973); *Lemon v. Kurtzman,* 403 U.S. at 613.

This Court recently stated that the legislative purpose requirement is violated "only" when the governmental activity was "motivated wholly by religious considerations":

> The court has invalidated legislation or governmental action on the ground that a secular purpose was lacking but *only* when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations. See, *e.g., Stone v. Graham, supra,* at 41; *Epperson v. Arkansas,* 393 U.S. 97, 107-109 (1968); *Abington School District v. Schempp, supra,* at 223-224; *Engel v. Vitale,* 370 U.S. 421, 424-425 (1962). Even where the benefits to religion were substantial, as in *Everson, supra; Board of Education v. Allen,* 392 U.S. 236 (1968), *Walz, supra,* and *Tilton, supra,* we saw a secular purpose and no conflict with the establishment clause.

Lynch v. Donnelly, 465 U.S. at 680 (emphasis added).

Similarly, *Wallace v. Jaffree* reiterated that the purpose requirement is violated only if a law "is *entirely* motivated by a purpose to advance religion" and is *not* violated if "motivated in part by a religious purpose." 472 U.S. at 56. Justice Powell observed in *Jaffree* that only after a court is "unable to discern an arguably valid

secular purpose" would the Court be required "by our precedents to hold that the statute fails the first prong of the *Lemon* test." 472 U.S. at 66 (Powell, J., concurring).

While Judge Becker in his dissent correctly looked for and found a secular purpose to the MOS,[33] the majority of the court of appeals erroneously assumed that the secular legislative purpose requirement requires a "overwhelmingly secular purpose." (J.S.A. 91a).

While a statute must satisfy each part of the tripartite test, the purpose prong has rarely been determinative of the inquiry, since it may be satisfied by a plausible secular purpose. Most recently, in *Wallace v. Jaffree*, 472 U.S. at 38 (statute permitting public school teachers to observe a one minute period of silence to be used by students for meditation *or voluntary prayer*) this Court held, after distinguishing the Alabama statute under review from an earlier Alabama law—the text of which is not significantly different from New Jersey's moment of silence law—that the later law was unconstitutional because a plausible secular purpose could not be discerned from its face nor was any non-religious reason for the statute's enactment offered or identified. In *Stone v. Graham*, 449 U.S. 39, 42 (1980) (statute requiring posting of ten commandments), this Court rejected a statement of secular purpose placed on the face of the statute because of the *inevitable* religious effect of posting such an "undeniably sacred text." In *Stone*, the Court did not peer behind the statute, but instead held that the use of an undoubted religious symbol served to define the "purpose" of the statute as a matter of law—subjective intent to the contrary notwith-

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[33] "The single unambiguous piece of evidence—the face of the statute itself—attests to the secular motives of the legislators. Parts of the testimony of the witnesses who attended the hearings also support this conclusion." (J.S.A. 58a).

standing.[34] Finally, in *Epperson v. Arkansas*, 393 U.S. at 107 (statute enacted by popular referendum barring the teaching of evolution), this Court invalidated the statute because no discernable secular purpose could be inferred—and none was suggested "other than the religious views of some of its [the state's] . . . citizens."

In none of this Court's decisions has the Court attempted to intrude into the area of subjective legislator motive when faced with a facially neutral, unambiguous statute.

The decisions of this Court demand that judicial inquiry into the purpose of a Legislature in enacting a law, such as the MOS, be limited. *See Everson v. Board of Education*, 330 U.S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose); *McGowan v. Maryland*, 366 U.S. at 466 (Frankfurter, J., concurring).[35] In *Jaffree*, Justice O'Connor commented on the scope of judicial review into legislative purpose: "If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if

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[34] While the purpose prong was not expressly discussed in this Court's decision in *Estate of Thornton v. Caldor, Inc.*, both the clear language of the statute, as well as the inevitable operative effect (favoring Sabbath observers) support the foregoing view. Thus through the use of its "effect" test, the Court has been able to resolve the issue without search for subjective legislator motivation. Indeed, in *Jaffree*, Justice O'Connor expressly suggested that where reliable legislative materials are not available to call a close case, the inquiry under the "effect" prong should serve to decide those cases where the validity of an expressed secular purpose is in doubt. *See Wallace v. Jaffree*, 472 U.S. at 76.

[35] As noted in *S&E Contractors v. United States*, 406 U.S. 1, 14 n.9 (1972), the rationale for a court's caution in construing the legislative purpose behind a given law "is the caveat of Mr. Justice Holmes, 'We do not inquire what the legislature meant; we ask only what the statute means.' The Theory of Legal Interpretation, 12 *Harv. L. Rev.* 417, 419."

the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 74-75 (O'Connor, J., concurring). Also in *Jaffree,* Chief Justice Burger observed this Court's long established precedent of "determining legislative purpose from the face of a statute as a whole." *Id.* at 86 (Burger, C.J., dissenting).

The New Jersey Legislature's purpose of providing public school students with a transition period at the commencement of the school day is manifestly constitutional, particularly when compared with other governmental activities for which this Court has found sufficient secular purposes.[36]

Here, the district court and the majority of the court of appeals simply chose to ignore all of this Court's teachings pertaining to the limited scope of an examination for legislative purpose. More importantly, their collective decisions reveal a fundamental lack of understanding of this Court's "purpose" inquiry in a constitutional setting. No attempt was made to determine the legislative purpose from the face of the neutral statute nor was any deference accorded to the "plausible" secular purpose identified by the Legislature. Instead, the district court veered in another direction under an unsanctioned standard which it viewed as permitting it to rely on irrelevant evidence concerning the lack of wisdom, necessity and efficacy of the

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[36] This Court has upheld various forms of financial aid to religious schools or to their students or parents, e.g., *Mueller v. Allen,* 463 U.S. 388 (1983); *Committee For Pub. Educ. v. Regan,* 444 U.S. 646 (1980); *Everson v. Board of Educ.,* 330 U.S. 1 (1947); a governmental Christmas display with nativity creche, *Lynch v. Donnelly,* 465 U.S. 668 (1985); Sunday closing laws, *McGowan v. Maryland,* 366 U.S. 420 (1961); equal access by religious organizations to public university facilities, *Widmar v. Vincent,* 454 U.S. 263, 271-272 (1981); and certain released time from public school programs for religious instruction, *Zorach v. Clauson,* 343 U.S. 306 (1952).

MOS; enabling it to patch illogical inferences on the basis of other attempts by earlier independent New Jersey Legislatures to return prayer to the public schools; and most disturbingly, permitting it to entertain the introduction of a hodge-podge of inadmissible hearsay comments from a handful of legislators in order to arrive at its conclusion that the MOS lacked an "overwhelmingly secular purpose."

When analyzed under the principles recited above, it is evident that both the district court and the majority of the court of appeals erred not only in understanding the proper scope of the purpose inquiry, but also in misapplying a number of fundamental decisions of this Court guiding inquiry in an Establishment Clause challenge.

III. THE COURT OF APPEALS ERRED IN APPLYING A "CLEARLY ERRONEOUS" STANDARD TO REVIEW THE TRIAL COURT'S "FACTUAL" DETERMINATION THAT THE STATUTE LACKS A SECULAR PURPOSE.

The court of appeals majority, employing a clearly erroneous standard of review (FED.R.CIV.P. 52a), let stand the district court's finding that the New Jersey Legislature's purpose in enacting N.J.S.A. 18A :36-4 was religious. In so doing, the court completely overlooked the "well-settled and respected rule" that in cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record. *Bose Corp. v. Consumers Union*, 466 U.S. at 498-499.

That well-settled rule which this Court articulated in *Bose* should have been applied in this First Amendment Establishment Clause controversy to the finding by the district court that the moment of silence legislation lacked any secular purpose. Independent appellate

review is particularly appropriate in the instant case because the finding of no secular purpose (1) involves the ultimate constitutional fact which goes to the heart of the purpose prong of the *Lemon* test; (2) directly implicates the constitutional claims of the parties; and (3) at the very least, involves a mixed question of fact and law. When the record in this matter is reviewed *de novo,* it is abundantly clear that the trial court's finding of no secular purpose cannot stand. However, as demonstrated by Judge Becker's dissent, even under a clearly erroneous standard, the finding of no secular purpose must be rejected by this Court.

In *Bose,* this Court emphasized that in cases involving substantial constitutional rights, an appellate court is required to independently review the entire trial court record in order to preserve the liberties established by the United States Constitution. The *Bose* court exercised plenary review of a lower court's finding of actual malice in a libel case. It specifically noted that the requirement of independent appellate review "is a rule of federal constitutional law" and "reflects a deeply held conviction that judges—and particularly Members of [the Supreme] Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." 466 U.S. at 510-511.

Although *Bose* involved a determination of whether a speaker had "actual malice", such a finding is, in a constitutional sense, identical to a determination of whether a statute has a secular purpose; both are important "constitutional facts" which presuppose a legal standard and have potentially grave effects on First Amendment rights.

The determination of whether a statute has a secular purpose goes to the very heart of this matter. It involves not only an analysis of the facts presented but also a com-

plete understanding and appreciation for the First Amendment rights directly and inextricably implicated. As Judge Becker in his dissent noted, "[d]istinguishing what is religious from what is secular is a process as overlaid with constitutional considerations as deciding the difference between protected and unprotected speech." (J.S.A. 46a).[37]

At a minimum, the finding of no secular purpose by the trial court involved a mixed question of law and fact, thereby warranting independent appellate review. It has long been established that independent appellate review is appropriate where "a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 280, 285-286 (1927).

The standard of review employed by the court of appeals majority is contrary to decisions of this Court, decisions of the Third Circuit in other cases, as well as the decision of other courts of appeals. In this Court's more recent Establishment Clause opinions, this Court has implemented, albeit *sub silentio,* a plenary review standard. *See e.g., Bob Jones University v. United States,* 461 U.S. 574, 605 n.32 (1983)[38]; *Lynch v. Donnelly,* 465 U.S. 668 (1984); *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703 (1985); *Witters v. Washington Dept. of Services for the Blind,* — U.S. —, 106 S. Ct. 748 (1986); *Munro v. Socialist Workers Party,* — U.S. —, 107 S. Ct. 533 (1986).

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[37] Judge Becker refused to limit *Bose* to cases involving free speech, finding that "[t]he constitutional prohibition of established religion is surely as important as the guarantee of freedom of speech." (J.S.A. 47a).

[38] *Bob Jones* was followed by the Third Circuit in *Presbyterian and Reformed Publishing Co. v. Commissioner of Internal Revenue,* 743 F.2d 148, 158 n.9 (3d Cir. 1984) where the court held that the Tax Court's determination of whether the organization had a tax-exempt purpose was subject to plenary review.

Similarly, in *Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984), *vacated* 106 S. Ct. 1326 (1986), the Third Circuit acknowledged that when presented with "constitutional facts," an appellate court is free to draw its own inferences from the record. 741 F.2d at 542 n.3. Significantly, and in sharp contrast to the panel which decided this matter, the Third Circuit in *Bender* recognized that independent appellate review was appropriate in cases directly implicating constitutional and, in particular, First Amendment rights. *Id.*[39]

The Supreme Court's decision in *Bose* was a reaffirmation of the well established principle that questions of constitutional fact compel an appellate court's *de novo* review of the record. As the *Bose* court explained:

> This Court 'has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and in doing so, 'this Court cannot avoid making an independent constitutional judgment on the facts of this case.'

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[39] Other courts of appeals have also refused to be bound by the clearly erroneous standard when presented with First Amendment issues. In *Brasslett* v. *Cota*, 761 F.2d 827 (1st Cir. 1985), the plaintiff, a public employee, claimed that he was discharged in violation of his First Amendment rights for remarks he made during a television interview. Noting that *Bose* reaffirmed the rule of independent appellate review historically applied in First Amendment cases, the First Circuit undertook an independent review of the district court's findings of fact regarding plaintiff's statements to the press—the nature of the plaintiff's speech and the impact of that speech on the defendants ability to perform their public responsibilities were protected under the First Amendment. *Accord*, *McMullen* v. *Carson*, 754 F.2d 936 (11th Cir. 1985). *See also United States* v. *Merrill*, 746 F.2d 458, 463-464 (9th Cir. 1984) (different levels of appellate review in obscenity case for each prong of the test set forth in *Miller* v. *California*, 413 U.S. 15 (1973)); *Lebron* v. *Washington Metro Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984) (where plaintiff claimed violation of First and Fourteenth Amendment rights when defendant refused to allow him to display his poster which criticized the Reagan administration; the court independently examined the whole record, following *Bose*).

466 U.S. at 508 n.27 (quoting *Jacabellis v. Ohio*, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.).[40]

The court of appeals panel majority, in contradiction to a number of decisions by other federal appellate courts (including decisions by other panels of its own court), implemented the wrong standard of review which, as the dissent persuasively points out, it then misapplied in the instant case. (J.S.A. 27a; 58a-60a). In so doing, the majority purported to escape its responsibility to correct the fundamental errors that permeated the district court's implementation of this Court's "purpose" test.

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CONCLUSION

For the reasons expressed herein and on the basis of the record, it is respectfully urged that this Court review this case and reverse the decision below. This case presents the vehicle for resolving finally the troublesome issue of the permissibility of a moment of silence as a part of opening school ceremonies, as well as providing the opportunity for definitively articulating the proper scope and manner of review of state legislative actions by the federal courts. Left untouched, the decisions on appeal authorize and justify a constitutionally incautious scrutiny by the judiciary of the legislative process. In bringing the matter to this Court, appellants, Alan Karcher and Carmen

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[40] More recently, in *Miller v. Fenton*, — U.S. —, 106 S. Ct. 445, 452 (1985), the Court refused to "abandon the Court's long-standing position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary, federal review." The Court reversed the Third Circuit's decision, which had employed the clearly erroneous standard of Rule 52(a). *Miller*, 741 F.2d at 1464 (3d Cir. 1984). It is noteworthy that Judge Gibbons dissented, apparently believing that less deference should be afforded the trial court in voluntary confession cases than in cases implicating First Amendment rights.

Orechio, the principal defendants-protagonists throughout these proceedings, maintain and sustain a legally cognizable interest, sufficient to support continuing justiciability of this matter which is of unquestioned public concern and import.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

—v.—

JEFFREY MAY, individually, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1). Whether standing to appeal exists for an individual legislator who originally entered the suit exclusively as a representative of the New Jersey Assembly and whose successor as official representative of that body has determined not to pursue an appeal?

2). Whether the trial court correctly determined that New Jersey's minute of silence law constitutes an establishment of religion because the Legislature's actual purpose was to return prayer to the schools and its proffered secular purpose was a mere pretext?

3). Whether the direct and immediate effect of New Jersey's minute of silence law as enacted and implemented is to advance religion?

4). Whether rule 52(a)'s "clearly erroneous" standard of review applies to the District Court's findings that A-1064 had no secular purpose and was enacted to reintroduce school prayer?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. BECAUSE THE ONLY PARTIES WITH STANDING TO BRING THE CURRENT APPEAL HAVE WITHDRAWN THE APPEAL, THERE IS NO CASE OR CONTROVERSY AND THE APPEAL MUST BE DISMISSED FOR WANT OF JURISDICTION	6
II. THE DISTRICT COURT CORRECTLY FOUND THAT THE PURPOSE OF THE NEW JERSEY LEGISLATURE IN ADOPTING BILL A-1064 WAS AN IMPERMISSIBLE RELIGIOUS PURPOSE—TO PROMOTE PRAYER IN THE PUBLIC SCHOOLS	13
A. The District Court Correctly Examined Whether the New Jersey Legislature Acted With an Illicit Purpose—to Promote and Encourage Prayer—When It Adopted A-1064	13
B. The Legislative History and Background of A-1064 Demonstrate that A-1064's Preeminent Purpose was to Promote Prayer in the New Jersey Public Schools	16
1. The District Court Considered Relevant, Probative Evidence	16

PAGE

2. Legislative Process Demonstrating Illicit Purpose 18

3. History of Prior Legislation Provides Additional Evidence 21

C. The Record Below Demonstrated that the Sole Secular Purpose Advanced by the Legislature—A Transition Period—Was a Pretext.. 23

D. By Invalidating A-1064 Only After Finding that the State's Sole Asserted Secular Purpose was a Pretext, and After Finding that the Actual Purpose of A-1064 was Religious, the District Court Correctly Applied the Purpose Prong of *Lemon v. Kurtzman* 26

III. BILL A-1064 HAD THE DIRECT AND IMMEDIATE EFFECT OF ADVANCING RELIGION AND HENCE VIOLATED THE "EFFECTS PRONG" OF *LEMON V. KURTZMAN* 28

A. Under The Minute of Silence As Structured Pursuant to A-1064, Some Teachers Would Inevitably Utilize the Minute of Silence For Prayer and Would Thus Influence Impressionable Children to Engage in Prayer 29

B. Because the Universal Public Perception of A-1064 was That its Purpose was to Encourage Prayer, That Law Had the Inevitable Effect of Advancing Religion 31

IV. ON THIS RECORD AND AS A MATTER OF ESTABLISHMENT CLAUSE JURISPRUDENCE, A-1064 CANNOT BE SUPPORTED BY A LEGISLATIVE PURPOSE TO ACCOMMODATE RELIGION 34

V. THE DISTRICT COURT'S FINDINGS THAT A-1064 HAD NO SECULAR PURPOSE AND THAT ITS PREEMINENT PURPOSE WAS TO

PAGE

REINTRODUCE PRAYER IN THE PUBLIC SCHOOLS ARE FACTUAL FINDINGS SUBJECT TO RULE 52(a)'s "CLEARLY ERRONEOUS" STANDARD OF REVIEW 38

CONCLUSION 43

TABLE OF AUTHORITIES

Cases	PAGE
Abington School Dist. v. Schempp, 374 U.S. 203 (1963)	14, 16
AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982)	11
Anderson v. Bessemer City, 470 U.S. 564 (1985)	39, 40, 41, 42
Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)	16
Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot*, 107 S. Ct. 738 (1987)	11
Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986)	3, 8, 9, 10
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Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973)	28
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Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979)	40, 41
Diamond v. Charles, 106 S. Ct. 1967 (1986)	*passim*
Duffy v. Las Cruces School Dist., 557 F. Supp. 1013 (D. N. Mex. 1983)	25, 29, 32
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PAGE

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Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) 31

Grosjean v. American Press Co., 297 U.S. 233 (1936).. 16

Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D.La. 1961) 27

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Hunter v. Underwood, 471 U.S. 222 (1985) .....*passim*

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1984), *aff'd mem.*, 455 U.S. 913 (1982)..... 14

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) ... 11

Kentucky v. Graham, 473 U.S. 159 (1985) 8

Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) 10

Lavender v. Kern, 327 U.S. 645 (1946) 18

Lemon v. Kurtzman, 403 U.S. 62 (1971) .....*passim*

Lynch v. Donnelly, 465 U.S. 668 (1984).....*passim*

Maine v. Taylor, 106 S. Ct. 2440 (1986) 39, 40

Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979)..... 37

McCollum v. Board of Educ., 333 U.S. 203 (1948) ..5, 29, 33

McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976), *rev'd on other grounds*, 448 U.S. 297 (1980) 11

Miller v. Fenton, 106 S. Ct. 445 (1986).....39, 40

Moore v. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984)..... 11

Opinion of the Justices, 440 N.E.2d 1159 (Mass. 1982). 29

Poe v. Ullman, 367 U.S. 497 (1961)..... 12

Poovey v. Edminsten, 526 F. Supp. 759 (E.D.N.C. 1981) 11

PAGE

Pullman-Standard v. Swint, 456 U.S. 273 (1982)..... 41

Rogers v. Lodge, 458 U.S. 613 (1982).....15, 41, 42

Schweiker v. Wilson, 450 U.S. 221 (1981) 20

Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969)..... 10

Stone v. Graham, 449 U.S. 39 (1980) 16, 27, 35

Thornburg v. Gingles, 106 S. Ct. 2752 (1986) 39, 42

United States v. O'Brien, 391 U.S. 367 (1968)..... 3

Wallace v. Jaffree, 472 U.S. 38 (1985) .....*passim*

Walter v. West Va. Bd. of Educ., 610 F. Supp. 1169 (D. W. Va. 1985) 25, 31

Washington v. Davis, 426 U.S. 229 (1976) 14

Witters v. Washington Dep't of the Blind, 106 S. Ct. 748 (1986) 34, 35

Statutes and Rules

Bill A-1064 .....*passim*

Fed.R. Civ. P. 52(a)..... 6

Fed.R. Evid. 803(24)..... 18

Supreme Court Rule 40(3) 8

N.J.S.A. 18A:36-3(c)..... 25

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PAGE

Note, 96 Harv. L. Rev. 1874 (1983).....13, 32

Note, 58 N.Y.U. L. Rev. 364 (1983)..... 33

Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).....40, 41

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C. Wright, *Federal Courts* (4th ed. 1983) 40

STATEMENT OF THE CASE

The history of this challenge to New Jersey's minute of silence law (hereinafter Bill A-1064) has been set out at length in Appellants' Brief and in the *amicus* brief of the Solicitor General. Appellees here will simply highlight the chronology of events involved in this litigation.

March 8, 1982: Bill A-1064, requiring a one minute period of silence in every public elementary and secondary school in New Jersey, is introduced. (J.S.A. 111a).[1] The bill succeeds Bill A-2197 (1981), requiring a period of silence "not to exceed one minute," which had been vetoed by Governor Brendan Byrne in May 1981 as "either unconstitutional or unnecessary." (J.A. 399).

May 17, June 21, and September 23 (1982): Perfunctory hearings are held before the Assembly Education Committee (May 17), and before the Senate Education Committee (June 21, September 23). (J.A. 268-70, 274-76, 406-07, 408-09). In all these hearings, A-1064's main sponsor, Assemblyman Zangari, is the sole witness favoring the bill. There is no testimony from any educator or psychologist indicating any non-prayer utility of a minute of silence. Professional educators' organizations uniformly oppose the bill.

October 1982: Bill A-1064 passes the Assembly and Senate.

December 6, 1982: Governor Kean vetoes A-1064 on the basis that legislators' statements reveal "a constitutionally impermissible motive" and the bill is therefore "unlikely [to] pass constitutional muster." (J.A. 382-83). The Governor, a teacher by training, also notes that teachers already have

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1 Appellees' citation system is as follows: "J.S.A." refers to the appendix attached to Appellants' jurisdictional statement. "Mot. to Dism. App." refers to the appendix attached to Appellees' motion to dismiss the appeal. "J.A." refers to the joint appendix filed in this Court. "J.A. 3d Cir." refers to the joint appendix filed in the Third Circuit. "R." refers to the transcript of the trial conducted by the district court.

discretion to use silence in the classroom when educationally needed.

December 13 & 16, 1982: The Assembly and Senate override the Governor's veto and A-1064 by its terms becomes effective immediately. The override debates are short and preoccupied with discussion of prayer in the classroom. (J.A. 36-37, 369-72, Plaintiffs' Exhibits 1-5, 10, 13, 15, 17).

December 17, 1982: The Deputy Commissioner of Education notifies school districts that A-1064 has been adopted and that "the statute should be permitted to speak for itself." (J.A. 3d Cir. 19a). No implementing guidelines are promulgated.

December 22, 1982: In testimony before the Senate Judiciary Committee the State Attorney General explains his decision not to defend Bill A-1064. He relies on a seldom-used discretion not to defend a state measure which he conscientiously believes is unconstitutional. (Plaintiffs' Supplemental Appendix in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 2-4).

January 10, 1983: Judge Debevoise issues a temporary restraining order against implementation of A-1064, relying on legislators' reported public statements indicating that the bill's object is to return prayer to the schools. (J.A. 51-53).

January 18, 1983: The state Assembly and Senate, through their presiding officers acting in a representative capacity, are allowed to intervene to defend A-1064. (J.A. 54).

October 10, 1983: After a five-day trial, Judge Debevoise finds that the Legislature's sole proffered purpose for A-1064—creation of a transition period—is a pretext. The actual purpose is found to be "religious"—meaning an effort to return prayer to the schools in an unconstitutional manner. (J.S.A. 86a-94a).[2]

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2 Appellants erroneously contend that the district court applied a novel standard requiring "an overwhelmingly obvious and important secular

December 24, 1985: A divided panel of the Third Circuit affirms the judgment of the district court. (J.S.A. 3a).

April 1986: The successor representatives of the state Assembly and Senate withdraw the appeal to this Court. (Mot. to Dism. App. 1a-5a).

SUMMARY OF ARGUMENT

I. In January 1983, after New Jersey's Attorney General refused to defend A-1064, the New Jersey Legislature intervened in the instant litigation through the then presiding officers of the Assembly and Senate, Alan Karcher and Carmen Orechio. The intervention hearing shows clearly that Karcher and Orechio intervened exclusively in an official capacity as representatives of their legislative bodies.

In April 1986, the successor representatives of the New Jersey Senate and Assembly withdrew the Legislature's appeal to this Court. Their action ends the case or controversy before this Court concerning the constitutionality of A-1064.

The only remaining Appellant, Alan Karcher, has no standing to bring this appeal. Karcher (who entered the suit solely in a representative capacity) has no standing as an individual legislator. In the first place, he did not enter the suit in that capacity and cannot change his capacity at this stage. *See Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1332 (1986). Second, where a collective body like a legislature controls a decision whether to appeal, only an official representative of that body (or the body itself) can make such a decision. *Id.* The official representatives of the New Jersey Senate and Assembly, Messrs. Russo and Hardwick, have withdrawn the instant appeal. Their decision governs. Finally,

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purpose" in order for a statute to satisfy the purpose prong of *Lemon v. Kurtzman*. (Appellants' Br. at 8, 28). The quoted language is taken out of context from a segment of the district court opinion distinguishing *United States v. O'Brien*, 391 U.S. 367 (1968), from the instant case. The trial court did not use that quoted language as the standard for secular purpose.

Alan Karcher as an individual legislator lacks Article III standing to bring this appeal. A single legislator's interest in the constitutional validity of an enactment does not constitute a particularized stake sufficient to confer standing.

The notion that Karcher can appeal as a representative of the 200th legislature, which expired three and one-half years ago, is divorced from reality. The decision whether to litigate further the fate of a state enactment declared invalid is a matter for the current legislative body. *See Diamond v. Charles*, 106 S Ct. 1967, 1703-04 (1986). The current legislature represents the constituency affected by such a decision, and the current legislature determines whether to incur the expenses involved.

II. Although A-1064 did not use the word prayer, it was surrounded by enough indicia of prayer to warrant the district court's inquiry into legislative purpose. Bill A-1064 was the eighteenth legislative measure since 1968 that sought to inject a morning silence exercise into New Jersey schools—measures introduced "in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling." (J.S.A. 86a).[3] In addition, both the governor (in casting a veto) and the attorney general (in refusing to defend the statute) had made independent determinations that A-1064 was motivated by an illicit religious purpose.

The district court used the very tools—examination of the background and circumstances of the legislative process—which this Court has endorsed whenever constitutional doctrine makes illicit legislative purpose a relevant inquiry. The examination of legislative background and circumstances disclosed much evidence that A-1064 was intended to endorse prayer and return it to the public schools. The legislative hearings and debates were found to be "in terms of public prayer and state involvement in religion." (J.S.A. 90a). Though the New Jersey Legislature makes no recording of its proceedings, Appellees showed that several key legislators—including the bill's chief sponsor (Assemblyman Zangari) and the President of the Senate (Senator Orechio)—made telling

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3 In the past when such measures were passed they were vetoed and never became law. *See, e.g.*, J.A. 394, 397, 399.

remarks disclosing that A-1064's purpose was to encourage children to engage in prayer in school.

The district court properly found that the sole secular purpose proffered in this litigation—creation of a transition period into the school day—was a pretext. The New Jersey Legislature had received no input indicating that existing transition devices were inadequate, or that a regimented minute of silence would be useful. All the input from educators indicated that teachers already had discretion to use silence as a tool when needed.

III. The history and administration of New Jersey's A-1064 also ensured that the statute's primary effect would be to encourage prayer. Despite a widespread public perception that the bill's purpose was to promote prayer, there were no administrative guidelines to explain alternative, secular uses of a minute of silence, and no guidelines to confine teachers in their implementation of the statute. New Jersey made no effort to disclaim an intention of endorsing a religious exercise or to prevent teachers from either intentionally or inadvertently promoting prayer.

IV. Appellees do not contend that a minute of silence exercise cannot be constructed without violating the establishment clause. We contend that New Jersey's statute as enacted and implemented cannot be deemed a valid accommodation measure. First, the Intervenor-Legislature has never argued that A-1064's actual purpose was to enable children to pray. Rather, the legislature has advanced a single purpose—creation of a transition period—which the district court found to be an after-the-fact pretext. Further, the well-grounded findings of the district court indicate that the actual purpose of A-1064 was to return prayer to the schools in a constitutionally impermissible manner.

A state must take extreme care in accommodating religion in the public school environment. *See McCollum v. Board of Educ.*, 333 U.S. 203 (1948). If a state decides to provide a time and place for silent prayer within the classroom, it must at least communicate alternative, non-prayer functions of that period and (through regulations or otherwise) ensure that

teachers will in no way favor the religious function. New Jersey has not taken such care here. Finally, the record showed there was no impediment to prayer (within the existing school framework) which might warrant a state accommodation of religion.

V. The proper standard governing appellate review of a district court's findings of fact is the "clearly erroneous" test of Rule 52(a). Although this Court concluded in *Bose Corp. v. Consumers' Union*, 466 U.S. 485 (1984), that a finding of "actual malice" in a libel case must be subjected to independent appellate review, *Bose* limits this requirement principally to the area of free speech. In addition, *Bose* was grounded largely on an overriding concern to ensure that constitutional rights are not unduly restricted by the lower courts, a principle that makes independent review inappropriate where, as here, the constitutional right at stake was vindicated by the district court.

This Court has consistently treated findings of illicit governmental purpose as questions of pure fact in diverse contexts, including establishment clause cases. *See Hunter v. Underwood*, 471 U.S. 222, 225-29 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). The "clearly erroneous" standard of review is not supplanted merely because the district court's findings of actual legislative purpose may be labeled as ultimate or dispositive "constitutional" facts.

ARGUMENT

I. BECAUSE THE ONLY PARTIES WITH STANDING TO BRING THE CURRENT APPEAL HAVE WITHDRAWN THE APPEAL, THERE IS NO CASE OR CONTROVERSY AND THE APPEAL MUST BE DISMISSED FOR WANT OF JURISDICTION.

Counsel who filed the jurisdictional statement in this matter informed the Court on May 6, 1986, that the current New Jersey Assembly and Senate "do not join in and are not appellants in this matter." (Mot. to Dism. App. 2a). Appellees

submit that the New Jersey Legislature, as Intervenor,[4] was the sole agency which could have processed this appeal. The Legislature's withdrawal therefore leaves this Court without a justiciable case or controversy, dictating dismissal of the appeal for lack of jurisdiction. *See Diamond v. Charles*, 106 S.Ct. 1697 (1986).

Appellants contend that Messrs. Karcher and Orechio originally intervened in this suit as individual legislators, as well as in their capacity as chief executive officers and representatives of their respective houses. (App. Br. at 11, 16). The record, however, refutes that claim.

The hearing on the Legislature's motion to intervene makes unmistakably clear that the party accorded intervenor status was the New Jersey Legislature.[5] Counsel for intervenor began the hearing by announcing his appearance "for the General Assembly and Senate, the intervenors." (Mot. to Dism. App. 12a). He then explained that he was acting on behalf of both the presiding officers of the Assembly and Senate, Mr. Karcher and Mr. Orechio respectively. *Id.* The ensuing discussion made plain that Karcher and Orechio were acting purely in their official capacities as representatives of the Legislature. The following exchange is illustrative:

> Mr. Marinari (counsel for intervenor): As the presiding officers of both houses, they are empowered by the rules of both houses to represent the house in litigation.
>
> The court: They are in a representative capacity?
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> Mr. Marinari: That is correct.

(Mot. to Dism. App. 15a). Counsel for the intervenors specified further:

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4 The instant suit was first brought against the N.J. Department of Education, as the agency which would implement New Jersey's minute of silence law. The State's Attorney General, as chief law enforcement officer, refused to defend the law. At that point, the New Jersey Legislature, through its presiding officers acting in their official capacities (Messrs. Karcher and Orechio), intervened to defend.

5 The full transcript of that January 18, 1983, hearing is reproduced in the Appendix attached to Appellees' Motion to Dismiss at 11a-27a.

> The institution is coming in as an institution. * * * It is the presiding officer of each House and in charge of all administrative duties, and from that we have been in numerous suits * * *.

(*Id.* at 16a-17a).[6]

The district court's order permitting intervention provides for intervention of Karcher and Orechio only in a *representative* capacity. (J.A. 54). Subsequently, on appeal to the Third Circuit, and on filing of the appeal before this Court, the only reference to Messrs. Karcher and Orechio was in their representative capacity. (J.S.A. 1a, 106a).

On January 14, 1986, when the 202d legislature assembled, Messrs. Karcher and Orechio were succeeded by Chuck Hardwick and John Russo as Speaker of the General Assembly and President of the Senate, respectively. Messrs. Hardwick and Russo, as successors in office to parties named in their official capacities as litigants, are automatically substituted as the representatives of the intervening party in this litigation. Supreme Court Rule 40(3); Stern, Gressman, & Shapiro, *Supreme Court Practice*, § 18.6, at 724 (6th ed. 1986); *Kentucky v. Graham*, 473 U.S. at 166 n.11. *See also Davis v. Preston*, 280 U.S. 406, 407 (1930) (official capacity party loses authority to pursue an appeal once successor takes office). By letter dated April 21, 1986, Speaker Hardwick, on behalf of the General Assembly, directed that the instant appeal be with-

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6 The intervention by the state legislature through its presiding officers was entirely consistent with "officer-capacity suits" as a pleading device to bring into a litigation "the entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *see Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1332 (1986). Appellants now argue that the presiding officers of the legislature may not have been authorized to intervene on behalf of their respective houses. (App. Br. at 16). This suggestion conflicts not only with representations made by their counsel at the hearing on intervention (Mot. to Dism. App. 15a, 17a), but also with the apparent custom of the New Jersey legislature to allow its presiding officers to intervene in litigation on behalf of the legislative bodies. *See Daggert v. Kimmelman*, 617 F. Supp. 1269 (D.N.J. 1985).

Because the Legislature had standing to defend A-1064, there is no merit to Appellants' suggestion that if there is currently no case or controversy the lower court decisions must be vacated. *See Diamond v. Charles*, *supra*.

drawn. (Mot. to Dism. App. 4a). A similar step was taken by President Russo on behalf of the Senate on April 28, 1986. *Id.* By a joint statement issued April 28, 1986, Messrs. Hardwick and Russo explained that "careful consideration of financial, constitutional and practical" factors had prompted the decision to withdraw the appeal. (*Id.* at 10a).

Once the only authorized intervenors—the New Jersey Senate and Assembly—withdrew their appeal, there was no longer a case or controversy before this Court. *See Diamond*, 106 S.Ct. at 1703-04. While Alan Karcher remains a member of the current New Jersey Legislature (without leadership status), he cannot now assert standing in that member capacity. As noted above, Karcher took part in this litigation solely in his representative capacity. This Court has determined that a party who has litigated in one status (such as in an official capacity of assembly speaker) cannot alter that status at an advanced appellate level in order to preserve an appeal which the real party in interest (the N.J. Legislature) has determined to drop. Thus, in *Bender*, *supra*, a school board member who had been sued in his official capacity could not launch an appeal in his personal capacity either as an individual board member or parent. The Court explained:

> The fact that [the board member] was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages.

106 S.Ct. at 1332 n.6.

Appellants seek to distinguish *Bender* on the basis that the board member there "had no interest in the suit as an individual," while here "the interests of Messrs. Karcher and Orechio" as individual legislators still exist. (App. Br. at 20). This simply misreads *Bender*. The Court in *Bender* did not rule that the individual board member had no cognizable interest. There, the Court held that the board member could not appeal in his individual capacity (for example, as a parent) because he had participated in the litigation solely in his official capacity. 106 S.Ct. at 1332, 1335. This reasoning applies fully to Kar-

cher, who entered this litigation solely in an official capacity and who is likewise seeking to alter his status or capacity before this Court.

There are additional reasons why Karcher cannot pursue this appeal as an individual legislator. Where, as here, a collective body (a legislature) is the party in interest in lower court proceedings, only an agent of the collective body and not an individual member of the body can invoke a right to appeal. *Bender*, 106 S.Ct. at 1333; *see Smuck v. Hobson*, 408 F.2d 175, 177-78 (D.C. Cir. 1969). In *Bender*, this Court ruled that the real party in interest was the legislative entity (a nine-member school board) and that an individual member could not supplant the entity for purposes of processing an appeal. 106 S.Ct. at 1328-29, 1333. "[M]embers of collegial bodies do not have standing to perfect an appeal the body itself had declined to take." *Id.* at 1333. This principle is particularly apt where, as here, a state legislative enactment is in issue. As this Court has explained:

> [T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State. . . . Because the State alone is entitled to create a legal code, only the State has the kind of "direct" stake [necessary] . . . in defending the standards embodied in that code.

Diamond, 106 S.Ct. at 1705. By barring standing to an individual member of a collegial body, the judiciary avoids becoming enmeshed in examination of whether a particular member is faithfully and adequately advancing the views of the collective body. *See* Dessem, *Congressional Standing to Sue*, 62 N.D. L. Rev. 1, 15 (1986).

Even if Karcher had entered the instant litigation in his individual capacity as a legislator, there would be a final bar to his prosecuting this appeal. In order to pursue an appeal, the prospective appellant must meet Article III standing requirements. *Diamond*, 106 S.Ct. at 1703. Yet an individual legislator ordinarily has no standing in federal court to litigate the constitutionality of a measure adopted by the collective body. *Korioth v. Briscoe*, 523 F.2d 1271, 1277-78 (5th Cir. 1975). This

is so whether the individual legislator is convinced that the statute is unconstitutional and seeks to attack it, or whether the legislator seeks to defend the measure against constitutional attack. *See Poovey v. Edminsten*, 526 F. Supp. 759, 765 (E.D.N.C. 1981); *McRae v. Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), *rev'd on other grounds*, 448 U.S. 297 (1980). A legislator's interest in the constitutional status of a statute is a generalized concern shared by all citizens equally; individual legislators therefore lack a personal stake in the outcome necessary to confer standing. *See AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982).[7]

There is a line of lower court decisions in which individual legislators have been accorded standing in order to prevent "nullification" of their votes. *See Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot*, 107 S.Ct. 738 (1987); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). But nullification in this context has meant disenfranchisement—that is, deviation from legally required processes of lawmaking in a fashion which deprives a legislator of an opportunity to vote. *See, e.g., Moore v. House of Representatives*, 733 F.2d 946, 951-52 (D.C. Cir. 1984). Mr. Karcher incurred no such deprivation.

The suggestion that Mr. Karcher retains standing to appeal as a representative of the 200th Legislature, which terminated at the end of 1983, is totally divorced from reality. The New Jersey *Legislature* was admitted as a party in order to defend the minute of silence law. At no time in the protracted course of this litigation was there any suggestion that a prior legislature rather than the current legislature was acting as intervenor. This was true, for example, during the appeal in the Third Circuit, which was conducted in 1984 and 1985 during the term of the 201st Legislature. The 201st Legislature, and not the 200th Legislature, pursued and paid the costs of that appeal. Nor did the notice of appeal or the jurisdictional statement

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7. Individual legislators incur no greater stake when a court declares a statute unconstitutional on grounds of illicit legislative purpose. A judgment about collective legislative purpose does not impugn the character of any individual legislator. Hence, the Appellants' claim of a special injury in the instant case (App. Br. at 26) must fail.

filed in this Court indicate that a prior, expired legislature was involved. (J.S.A. 106a).

It is self-evident that a decision whether to appeal a judgment declaring a state enactment unconstitutional is a matter of policy for the current legislature or executive. Official acquiescence in a declaration of unconstitutionality means that a legislative measure will not be *currently* and prospectively enforced. *Diamond*, 106 S.Ct. at 1705. The primary impact of a decision whether to appeal is on the constituency of the current legislature. This is true as to the many considerations that go into a decision whether to appeal a judgment—importance of maintaining a statute in force, economic costs to be incurred in the appeal, changes in the will of the electorate, and alternative means to accomplish whatever legitimate legislative objectives are at stake.

A prior legislature cannot be accorded a proprietary interest in a State's enactment. The notion that a long-expired legislative body retains control of current litigation offends all sense of sound procedure. Sometimes, many years elapse between passage of a law and its judicial resolution. *See Hunter v. Underwood*, 471 U.S. 222 (1985) (84 years); *Poe v. Ullman*, 367 U.S. 497 (1961) (82 years). Yet dead-hand control would preclude the current legislative leadership from settling a litigation according to a fair assessment of current public policy concerns. Moreover, the dead-hand leadership could no longer consult with its legislative constituency. The current legislative leadership, by contrast, can always consult with its legislative constituency. The current legislature, not the 200th legislature which expired over three years ago, is the appropriate body to decide whether to appeal. Its duly elected representatives have withdrawn the current appeal. That decision of April 1986 ended the case or controversy upon which this Court's jurisdiction hinges.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE PURPOSE OF THE NEW JERSEY LEGISLATURE IN ADOPTING BILL A-1064 WAS AN IMPERMISSIBLE RELIGIOUS PURPOSE—TO PROMOTE PRAYER IN THE PUBLIC SCHOOLS.

A. The District Court Correctly Examined Whether The New Jersey Legislature Acted With An Illicit Purpose—To Promote And Encourage Prayer—When It Adopted A-1064.

Appellants argue that A-1064 was a "facially neutral" statute with a plausible secular purpose on its face. They contend therefore that the district court should never have examined the background and circumstances of the law in order to determine that the measure had no secular purpose and that its object was "religious." (J.S.A. 90a). The argument is misplaced for two reasons. Bill A-1064 was not really neutral on its face. And even if it had been neutral, that fact would not preclude an inquiry into whether the *actual* legislative purpose was to promote and encourage prayer in the public schools.

As to neutrality, although A-1064 uses the language "contemplation or introspection" and does not by terms mention prayer, it cannot be viewed realistically as divorced from prayer. The term "contemplation" often connotes a religious act involving private religious devotion. (J.A. 139-40; R. 295). Most pupils have been exposed to organized silent meditation only in a place of worship. *See* Note, 96 Harv. L. Rev. 1874, 1891 (1983). The opening minutes of the school day in New Jersey were historically used for prayer. (J.A. 355; J.S.A. 67a, 86a). Organized group silence is a traditional form of prayer associated with major religious bodies in New Jersey, such as the Quakers. (J.A. 139, 141; R. 289). Given these facts, the installation of a period for silent "contemplation" at the beginning of the school day is at the very least suggestive of prayer.

Additional factors undermined A-1064's veneer of "neutrality." The statute appears to make the minute of silence permissive,[8] suggesting that persons having conscientious objections should be free to abstain. This acknowledgement of potential conscientious objection to the minute of silence exercise itself betrays a recognition of the exercise's religious character. If the purpose of a minute of silence were simply to promote a secular object like tranquil thought, there would be no need to excuse persons from the silence exercise. *See Abington School Dist. v. Schempp*, 374 U.S. 203, 224 (1963); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). Finally, the only secular purpose asserted by the Legislature in defending its minute of silence law—creation of a transition period with a psychological "calming effect" on pupils—did not appear on the face of the statute. Rather, that purpose was first advanced well into the course of the litigation. *See* J.S.A. 91a (district court finding that A-1064 upon passage became "a statute in search of a secular purpose").

In short, the language of A-1064 was at best ambiguous about actual legislative purpose. Since an organized morning silence exercise carries strong implications of prayer, the district court was warranted in examining whether A-1064's actual purpose was to encourage prayer in New Jersey's public schools.

Even if A-1064 were deemed neutral in its language, that fact would not preclude examination of whether the measure was actually intended to advance prayer. In some areas of constitutional jurisprudence illicit legislative purpose is a key element. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (racial discrimination); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (estab-

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8 The statute uses terms such as "permit" a minute of silence and "discretion" of the individual student. The trial court was uncertain whether A-1064 required students to remain in the classroom during the minute of silence. (J.S.A. 84a). However, all three judges in the Third Circuit concluded that A-1064 was "permissive," and that students objecting to observance of a minute of silence might well be permitted to leave the classroom. (J.S.A. 15a, 22a, 33a). Appellees agree that A-1064 appears permissive on its face and leaves room for an interpretation under which objecting students may leave the classroom.

lishment clause). With regard to the establishment clause, Justice Stevens recently noted:

> In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion. * * *
>
> The proper inquiry under the purpose prong of *Lemon v. Kurtzman* . . . is whether the government intends to convey a message of endorsement or disapproval of religion.

Jaffree, 472 U.S. at 58, 60 n.52 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring)).

Where, as here, illicit purpose is properly in issue, even the facial neutrality of an enactment cannot bar judicial inquiry into the background and circumstances of the enactment's adoption. This was vividly demonstrated in *Hunter v. Underwood*, 471 U.S. 222 (1985). There, litigants challenged a provision of the 1901 Alabama constitution that disenfranchised all persons convicted of a crime involving moral turpitude. Though the measure applied to both blacks and whites, and though there was a plausible legislative purpose visible on the measure's face (the barring of morally unfit voters), the challengers proved that racial animus was actually behind the ostensibly neutral provision. *Id.* at 229. *See also Rogers v. Lodge*, 458 U.S. 613 (1982) (at-large voting district).

The same principle applies under the establishment clause. Facial neutrality of a statute cannot bar inquiry into illicit religious purpose. As Justice O'Connor observed in *Jaffree*:

> [T]he face of the statute *or its legislative history* may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead *requires courts to examine the history, language, and administration of a particular stat-*

ute to determine whether it operates as an endorsement of religion.

472 U.S. at 73-74 (emphasis added). In sum, the district court in the instant case was acting consistently with precedent in examining A-1064's history and background.

A "neutral" statute with an *avowed* secular purpose cannot foreclose judicial inquiry into *actual* legislative purpose. Litigants must be permitted to demonstrate a "sham" secular purpose underlying an enactment. *See id.* at 64 (Powell, J., concurring); *id.* at 75 (O'Connor, J., concurring). Government may not use a pretext or facade in order to promote or endorse a religious exercise. And the only limit to the manufacture of secular purposes is the imaginativeness of counsel representing legislative bodies. These principles are confirmed in cases like *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968); and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

B. The Legislative History And Background Of A-1064 Demonstrate That A-1064's Preeminent Purpose Was To Promote Prayer In The New Jersey Public Schools

1. The District Court Considered Relevant, Probative Evidence

In considering an illicit legislative purpose, a court must examine legislative history and background, including contemporaneous statements by members of the relevant legislative body. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *Jaffree*, 472 U.S. at 55-58; *Hunter v. Underwood*, 471 U.S. at 228. Legislators' statements are unlikely to be an exclusive index of legislative purpose. After all, most legislators will either not participate in debates or will avoid any comments which might betray an illicit purpose. Nonetheless, legislators' remarks can furnish a useful element of proof of legislative purpose, especially when made by key participants in the legislative process (e.g., sponsors, floor leaders). *See Jaffree, supra*; *Federal Energy Administration v. Algonquin Inc.*, 426 U.S. 548, 564 (1975); *Grosjean v.*

American Press Co., 297 U.S. 233 (1936). At the very least, committee hearings and legislative debates are indicative of the historical milieu, the information, and the thinking behind a legislative decision, and are thus probative of legislative purpose. *See* Raveson, *Unmasking the Motives of Government Decisionmakers*, 63 No. Car. L. Rev. 879, 977-78, 982-83 (1985).

In the case of A-1064, several factors complicated the task of establishing legislative purpose. The New Jersey Legislature preserves no transcript of its committee hearings or floor debates. (J.S.A. 14a). Plaintiffs' requests for documents used in consideration of A-1064, as well as for admissions regarding legislators' statements, were met by a claim of legislative privilege. (J.A. 3d Cir. 126a-140a). While the claim of privilege was rejected, the trial court did rule that it would be "unseemly" to require legislators to be deposed or to answer interrogatories. (*Id.* at 150a-52a). Consequently, the discovery available to the Appellees here was quite circumscribed.[9]

Despite these barriers, Appellees presented several witnesses who described their first-hand observations of the committee hearings and some of the floor debates leading to passage of A-1064. The district court ultimately concluded that the debate surrounding A-1064 was "in terms of public prayer and State involvement in religion." (J.S.A. 90a). The court similarly found that legislators' statements were "confirmatory of an institutional purpose to accomplish something the Constitution forbids." (J.S.A. 92a). In making these findings the trial judge relied primarily on the witnesses mentioned above, rather than upon newspaper reports quoting legislators' statements which were also in evidence. (J.S.A. 85a n.4).[10]

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9 The district court prohibited Appellees from calling the legislators to testify and granted the motion quashing interrogatories and requests for admissions concerning legislators' statements. J.S.A. 68a n.2; J.A. 3d Cir. at 152a-54a.

10 The Circuit Court found that the newspaper reports presented a "difficult" issue of evidence, but ruled that the district court's conclusions

Nonetheless, the newspaper clippings were properly admitted by the district court and deserve full consideration.[11] Because the newspaper articles were properly admitted, Appellees will use several quotations from the articles to show that the trial court's conclusions concerning the legislative history of A-1064 were well grounded in the record.

2. Legislative Process Demonstrating Illicit Purpose

After A-1064 was filed on March 8, 1982, the first committee hearing took place before the Assembly Education Committee on May 17, 1982. The New Jersey School Boards Association (hereinafter NJSBA) appeared in order to oppose the bill as an unnecessary legislative interference. (J.A. 274, 406-07). Assemblyman Zangari, the bill's chief sponsor, was the sole witness to favor the bill. In his remarks, Mr. Zangari noted that it was "important that our society get back to religious values. . . ." (J.A. 275, 406-07). No one, let alone a trained educator or psychologist, testified as to the possible utility of a minute of silence as a transition period. (*Id.*; *see also* J.A. 300).

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would not have been any different if the newspaper clippings had been excluded from evidence, and that "ample other evidence support[ed] the district court's conclusion that the purpose of the legislation was not secular but religious." (J.S.A. 27a-28a n.9).

11 With regard to legislative purpose, the newspaper articles fall squarely within Fed.R. Evid. 803(24) as more probative to establish the legislative purpose expressed by legislators than any other evidence Appellees could procure through reasonable efforts, and as having circumstantial guarantees of trustworthiness. The district court so ruled. (J.A. 122-26). That court's ruling on the admissibility of this evidence should not be disturbed absent a clear showing of abuse of discretion. *See Lavender v. Kern*, 327 U.S. 645, 654 (1946).

Appellees would have called reporters, if necessary, to testify to the accuracy of the quotations (J.A. 92, 96-97), but the court ruled that this was unnecessary. (J.A. 124). The articles were trustworthy. There was substantial agreement among them as to the legislators' statements, thus corroborating accuracy of the quotations. (J.A. 122). Not a single author of any statement in question ever denied or sought to modify the reported remarks. (See J.A. 96, 98, 122-23).

The next legislative step was a hearing before the Senate Education Committee on June 21, 1982. Again, there was no testimony from any expert or person with background in education to indicate any non-prayer utility of a minute of silence exercise. (J.A. 268). Assemblyman Zangari appeared on behalf of his bill, mentioned that it would have "an educational purpose" (J.A. 269), but also underlined his own positive experience with prayer in the classroom (J.A. 270). When Mr. Joseph Chuman (Plaintiffs' witness) privately asked Mr. Zangari why he was not sensitive to the interests of atheists in propounding his bill, Mr. Zangari replied that their feelings could be discounted because they were so few in number. (J.A. 270).

The second and final Senate Education Committee hearing occurred on September 23, 1982. The NJSBA again appeared to oppose A-1064. Assemblyman Zangari appeared on the bill's behalf. Mr. Zangari was asked why, since students already have opportunities to pray during a school day, A-1064 was necessary. His reply: "They won't publicly do it [pray] unless they're directed." (J.A. 408-09).

Bill A-1064 passed the New Jersey Senate on October 18, 1982, after a one-hour debate. See N.Y. Times, Oct. 19, 1982, at A1. At the debate, advocates of the bill contended that it provided a way to enable schoolchildren to pray quietly and voluntarily; opponents called the bill unnecessary and unconstitutional. *Id.* Senate President Orechio "led the fight for passage." Asbury Park Press, Oct. 19, 1982, Plaintiffs' Exh. 9. Senator Orechio acknowledged that the bill was designed to "bring prayers back into the school through the front door." *Id.* He also commented: "This bill will not harm any school-age child. Rather, it will restore his faith in his Creator." Newark Star Ledger, Oct. 19, 1982, Plaintiffs' Exh. 14. Senator Dumont remarked during the debate that there was no difference between a moment of contemplation in the schools and prayers used at the start of each legislative session. Trenton Times, Oct. 19, 1982, Exh. 12. Senator Bassano, an opponent of the bill, commented:

> I keep hearing the word [prayer] over and over again. And if that's what it's about, then it's unconstitutional. It makes no difference whether you come in the front door or the back door.

Asbury Park Press, Oct. 19, 1982, Plaintiffs' Exh. 9.

On December 6, 1982, Governor Thomas Kean vetoed A-1064. (J.A. 381). The Governor noted that legislators' public statements had revealed "a constitutionally impermissible motive" behind A-1064, making it "unlikely that the bill could pass constitutional muster." (J.A. 382-83). Governor Kean particularly noted the quote that adoption of A-1064 would mean "bringing prayer back into the schools through the front door." *Id.* As chief executive, the governor's assessment of a bill's purpose is entitled to significant weight. *See Schweiker v. Wilson*, 450 U.S. 221, 244 n.7 (1981) (Powell, J., dissenting).

The subsequent override debates in both the Assembly and Senate focused on the issue of prayer in the schools. Any purported psychological benefit from a calming transition period was apparently not discussed. The only educational benefit mentioned was an improvement in school climate and a consequent decrease in crime and disruption. (J.A. 36-37, 369-72; J.S.A. 71a).

The Senate override debate took place on December 16, 1982. According to an eyewitness, there was no discussion of the pedagogical objectives of A-1064, other than the "social control argument" mentioned above. (J.A. 371).[12] Senator Dumont expressed indifference to the apparent mixing of church and state. (J.A. 370). He stated: "I don't think we ought to adhere so closely to the separation of church and state that we forget other things are more important." Bergen Record, Dec. 17, 1982, Plaintiffs' Exh. 10. Senator Kennedy stated that the founding fathers never thought children could not take a moment to think about God and religion, and that perhaps it was time to put the constitutionality of prayer back

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12 One Senator (Paolella) was quoted as saying A-1064 could support "discipline and morality" and not necessarily prayer. (J.A. 372).

before the Supreme Court. Trenton Times, Dec. 17, 1982, Plaintiffs' Exh. 13. At the Assembly override debate on December 13, 1982, Assemblyman Wolf, one of the bill's supporters, stated: "Whether we want to hide behind contemplation or reflection, it's prayer." Newark Star Ledger, Dec. 14, 1982, Exh. 2. *See also* Bergen Record, Dec. 14, 1982, Exh. 4.

Bill A-1064 became law on December 16, 1982. On December 17, 1982, New Jersey's Attorney General, Mr. Kimmelman, announced that as chief law enforcement officer of the state he would take no steps to defend the newly enacted minute of silence law. He had determined, after "careful scrutiny" of the law, that the minute of silence law was unconstitutional. (Plaintiffs' Supplemental Appendix in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 2-4). Thus, the governor and the attorney general of New Jersey each reached the conclusion that A-1064 was tainted by an illicit purpose to promote prayer in the schools.

3. History of Prior Legislation Provides Additional Evidence

Another useful element of proof concerning the history and background of A-1064 was Plaintiffs' documentation of a succession of similar New Jersey legislative measures concerning morning moments of meditation or silence in the schools. There were 18 such bills introduced between 1968 and 1982. *See* Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Unconstitutional?* 35 Rutgers L. Rev. 341, 356 (1983). These bills, together with material about their legislative history, were introduced in order to show that A-1064 was a culmination of repeated efforts (by forces favoring prayer-in-the-schools) to adopt laws circumventing the Supreme Court's rulings of the early 1960's. After examining the bills, information about their legislative history, and the relevant executive veto messages, the trial court found:

> In New Jersey legislation was proposed from time to time with the rather obvious purpose of reintroducing opening prayer in some form in the public schools. (J.S.A. 67a).

> [M]any New Jersey legislators introduced one bill after another in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling. (J.S.A. 86a).

The district court also determined that A-1064 was part of this succession of events and was infected by the same illicit purpose. *Id.*

Appellants strenuously object to the introduction and use by the trial court of prior legislative measures. (*See* App. Br. at 35, 42).[13] Yet the data about bills of prior legislatures furnished a useful probative link in the evidentiary chain relating to the actual purpose of A-1064. It was helpful to place A-1064 in the context of an historic movement to reintroduce prayer into the schools, just as it is useful to place any legislative enactment in its historical context. *See Hunter v. Underwood*, 471 U.S. at 230-31 (testimony that a 1901 Alabama convention was part of a post-Reconstruction movement in the South to disenfranchise blacks was key to attributing an illicit purpose to facially neutral legislation growing out of that convention).

As the trial court noted, minute of silence laws have both a national and a local historical context which helps cast light on their purpose. (J.S.A. 67a). In the case of the New Jersey Legislature, the record demonstrated that three successive governors had vetoed morning exercise measures (including A-1064) because of constitutional concerns stemming from the perceived religious purpose, and because of grave doubts about any educational need for such exercises. (J.A. 381, 394, 397, 399; *Veto Messages of the Governor* 521-23 (1969)). The New Jersey Department of Education had also gone on record as opposing such prior measures as "contrary to the spirit and holdings of the U.S. Supreme Court." (Position Statement of the N.J. Dept. of Educ. regarding A-648 (1976), dated 2/2/76,

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13 While Appellants do not appear to contest that the prior measures constituted "attempts by earlier independent New Jersey legislatures to return prayer to the public schools," (App. Br. at 42) they argue that the illicit motivation of the prior bodies cannot be attributed to the legislature which adopted A-1064. (*Id.* at 35 n.28).

in Plaintiffs' Supplemental Appendix in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 9).[14]

C. The Record Below Demonstrated That The Sole Secular Purpose Advanced By The Legislature—A Transition Period—Was A Pretext

Appellants have indicated during the course of this litigation that the sole legislative purpose behind A-1064 was to provide a transition period to calm students before the school day. (J.S.A. 82a; App. Br. at 13). As described above, the legislative history of A-1064 shows no significant attention to this purported rationale; rather, the legislative debates focused sharply on the desired relationship between prayer and the public schools. The record below contains much additional support for the trial court's conclusion (J.S.A. 87a) that the Legislature's asserted rationale was a pretext.

There was not one iota of evidence that anyone connected with New Jersey's educational system had ever communicated to any legislator the notion that a calming transition period was needed within New Jersey's schools. To the contrary, the record establishes that a wide variety of sources had uniformly informed the Legislature that such a device was unnecessary. For example, the New Jersey Education Association (NJEA), the union representing 84,000 teachers in New Jersey, informed the Legislature that it opposed A-1064 because it was unnecessary and appeared to be aimed at subverting constitutional strictures on prayer in the classroom. (J.A. 375-77). Likewise, the NJSBA, representing 611 school boards in New Jersey,

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14 The link between A-1064 (1982) and its predecessors was particularly close with regard to Bill A-2197 (1981). Both bills called for a one minute period of silence in the public schools. Twelve of the twenty sponsors of Bill A-2197 (1981) became sponsors of A-1064 (1982). Assemblyman Zangari was the chief proponent of both measures. Like its successor A-1064, Bill A-2197 was passed after brief debate in which prayer was the focus of discussion. Like A-1064, Bill A-2197 drew opposition from education groups because it was perceived as an effort to reintroduce prayer into the schools. (J.A. 287-89; Plaintiffs' Exh. 78; J.A. 3d Cir. at 655a). Like A-1064, Bill A-2197 provoked an executive veto. (J.A. 399). In short, the links between A-1064 and predecessor morning exercise bills were sufficient to support the trial court's use of such bills to help discern the religious purpose behind A-1064.

opposed minute of silence legislation as simply an effort to reintroduce prayer into the schools. (J.A. 282, 292-94, 403-04; J.S.A. 71a). *See also* R. 320-22 (opposition of the New Jersey School Administrators' Association).

Governor Kean, himself a trained educator, restated in his veto message the same message previously communicated by these groups of informed educators:

> New Jersey public school teachers do not need a legislative mandate of one minute of silence in order to maintain order in their classrooms. Rather, teachers already have the discretion to silence their classes for one minute, five minutes, or twenty minutes, as they in their wisdom choose.

(J.A. 383).[15]

The evidence below went well beyond showing educators' uniform opposition to a transition period. In addition, Appellees presented expert testimony demonstrating three elements: absence of utility in a minute of silence as a transition period; availability of alternative transition devices which could easily be used (and were in fact in use); and harm which would flow from the minute of silence period as structured.[16] This expert

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15 Previous governors had communicated the same message to the Legislature—that teachers could already employ silent contemplation if educationally helpful and that a regimented minute of silence at the start of every day would not be educationally sound. (J.A. 394-97).

16 The main witness was Professor Peter Kuriloff, an expert in social psychology of the classroom and in school discipline. (J.A. 181-82). His testimony established that the minute of silence as a transitional device was a "poor" one in contrast to various alternatives, including existing ones. (J.A. 194, 196-98, 221-23). Moreover, Bill A-1064 included no guidelines for administration and hence would pose "a potential disciplinary nightmare" for school officials. (J.A. 188-89, 202-03). Most important, Professor Kuriloff testified that a minute of silence is a long period for children in kindergarten through third grade, and that the duration would be quite "anxiety provoking" for such children. (J.A. 188-89, 193).

Professor Stanley Rosner of Temple University provided added insight with regard to his specialty—handicapped children. Professor Rosner noted that for many retarded, learning disabled, or emotionally disturbed children

testimony was not aimed at attacking the wisdom of A-1064; it is beyond dispute that the wisdom of legislation is not a judicial concern. Rather, the testimony served to establish that the chasm between the minute of silence as structured in A-1064 and sound educational policy for New Jersey's schools was so deep that a legislative body acting in good faith could not possibly have adopted such a sweeping measure.

Appellants attempted to refute the evidence described above concerning the educational vacuity of a minute of silence for New Jersey schools. They presented a psychologist from Las Cruces, New Mexico, to testify about a "study" he did on a minute of silence there. (J.A. 313-14).[17] Appellants also presented a fifth grade teacher from Sayreville, New Jersey, who thought that a moment of silence there had been useful. (J.A. 327-28).[18] Finally, Appellants presented a sociologist who contended that the minute of silence might have some educational utility. (J.A. 352-53). There was, of course, not a shred of evidence that the legislature had been aware of any of this material when it adopted A-1064. "A rationale developed long after passage of [a measure] . . . but asserted in support of its 'purpose' is entitled to little probative value." *Walter v. West Va. Bd. of Educ.*, 610 F. Supp. 1169, 1176 (D.W.Va. 1985).

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a minute of silence would present difficulties of attention and would have negative behavioral impacts. (J.A. 303-07). The testimony of Professors Kuriloff and Rosner was supplemented by New Jersey school administrators and educators who also could find no educational utility behind a minute of silence exercise as imposed by A-1064. (J.A. 230-31, 238, 294). The transition function was already served by existing opening exercises. *See, e.g.*, N.J.S.A. 18A:36-3(c) (flag salute).

17 Despite use of the study in New Mexico litigation, a federal judge there found that the local moment of silence law was not intended to promote "intellectual composure," but rather to advance prayer. *See Duffy v. Las Cruces School District*, 557 F. Supp. 1013 (D. N.Mex. 1983). The "intellectual composure" rationale was found to be an "afterthought" devised to try and salvage a religious exercise. *Id.* at 1016.

18 Of course, Sayreville used an exercise shorter than a minute, and Sayreville had been operating under a local ordinance, and not pursuant to Bill A-1064.

Having heard this various testimony, Judge Debevoise concluded that the "transition period" rationale was an after-the-fact rationale manufactured to try and salvage A-1064. (J.S.A. 84a-88a). There was no genuine educational need—no curricular purpose, either actual or perceived—behind A-1064. The minute of silence was simply "an empty sack" into which the Legislature wanted to pour prayer. (J.A. 189, 220, 230-31).

D. By Invalidating A-1064 Only After Finding That The State's Sole Asserted Secular Purpose Was A Pretext, And After Finding That The Actual Purpose Of A-1064 Was Religious, The District Court Correctly Applied The Purpose Prong Of *Lemon v. Kurtzman*

As this Court recently explained in *Jaffree*, a statute fails the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 62 (1971), if it does not have "a clearly secular purpose." 472 U.S. at 56. The Court added: "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.' " *Id.* (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

This is precisely the standard which the district court applied in the instant case. Appellants incorrectly assert that the district court applied a novel standard requiring "an overwhelmingly obvious and important secular purpose" for a statute to satisfy the purpose prong of *Lemon v. Kurtzman*. (App. Br. at 28). Judge Debevoise was entirely faithful to the *Jaffree* standard in invalidating A-1064 only after finding that the state's sole secular purpose was a pretext, and that the bill's background and history revealed an actual religious purpose of reintroducing prayer to the public schools. (J.S.A. 87a, 91a, 92a, 94a).[19]

In effect, the trial court found that there was *no* secular purpose behind A-1064, because it rejected as a pretext the only secular purpose identified by the Intervenors (as well as finding

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19 As documented in detail in Point IV, *infra*, when the trial court stated that the purpose of A-1064 was "religious," it meant that the Legislature's purpose was to reintroduce prayer to the public schools in an unconstitutional manner.

that the actual purpose was to reintroduce prayer). But it would be sufficient under the purpose prong of *Lemon v. Kurtzman* to find that the predominant or preeminent legislative purpose was to promote religion or prayer. *See Stone v. Graham*, 449 U.S. at 43. For the secular purpose requirement cannot be deemed satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

The preeminent religious purpose standard is appropriate, as opposed to a "no secular purpose" standard, because it is unrealistic to demand that litigants demonstrate the total absence of a secular purpose. Crosses may be erected on public property in part to attract tourism. Posting of the ten commandments may be intended by some legislators to help instill moral (as opposed to religious) values, or to illustrate one of the foundations of our legal system. *See id.* Given the inevitable existence of subsidiary secular purposes underlying a religious measure, it is sufficient under the purpose prong of *Lemon v. Kurtzman* to find that a statute's preeminent or predominant purpose is to promote religion or prayer.

In sum, this Court should uphold the district court's determination to invalidate A-1064 because it is clear from the record that the preeminent purpose of the New Jersey Legislature was to encourage prayer in the schools. Judge Debevoise wisely heeded the admonition of one of his colleagues on the federal bench:

> We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men.

Hall v. St. Helena Parish School Board, 197 F. Supp. 649, 654 (E.D. La. 1961). The governor of New Jersey knew that A-1064 was intended to promote prayer in the public schools. (J.A. 381-83). The attorney general knew that A-1064 was intended to promote prayer. (J.S.A. 66a). School administrators knew. (J.A. 230-31; R. 321). Teachers knew. (J.A. 40; R. 323). The editors of New Jersey's largest newspapers knew. (Plaintiffs' Exh. 27, 29, 30, 35, 36, 37, 40, 41, 42, 44, 45, 47,

49). Judge Debevoise could hardly blind himself to the public statements of A-1064's supporters and the legislative history and background, as described above. He simply agreed with the observation of one superintendent of schools, who stated with regard to A-1064 and prayer:

> Call it what you want, but if it walks like a duck and has feathers and quacks, it is still a duck. (J.A. 234).

III. BILL A-1064 HAD THE DIRECT AND IMMEDIATE EFFECT OF ADVANCING RELIGION AND HENCE VIOLATED THE "EFFECTS PRONG" OF *LEMON V. KURTZMAN*

A legislative measure which has the "direct and immediate effect of advancing religion" constitutes an unconstitutional establishment of religion. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 785 n. 39 (1973). The district court in the instant case ruled that A-1064 would both advance and inhibit religion. (J.S.A. 94a). That court determined that by setting aside a special time period to allow schoolchildren to pray, and by requiring all children present to be quiet and respectful, New Jersey would be advancing religion for those children whose prayer habits were suited to that format while inhibiting religion for those children whose prayer required sound or movement. (J.S.A. 95a-96a). The Third Circuit refused to endorse this ruling of the district court. (J.S.A. 21a-22a).[20]

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20 The Third Circuit's unwillingness to uphold this aspect of the trial court's decision was grounded in part on the circuit court's perception that A-1064 is "permissive" in force. That is, the circuit court felt that the law permits students not to participate in the minute of silence exercise—presumably allowing them to leave the classroom. (J.S.A. 20a-21a). Appellees agree that this is a possible reading of A-1064. Nonetheless, Appellees submit that for reasons articulated in this Point, A-1064 should be deemed to have the direct effect of advancing religion even if children's participation in the minute of silence exercise is fully permissive.

Some courts have invalidated moment of silence laws according to "effects" analysis. *See Duffy v. Las Cruces School District*, 557 F. Supp. 1013, 1021 (D.N.Mex. 1983); *Opinion of the Justices*, 440 N.E.2d 1159, 1162 (Mass. 1982). These courts have reasoned that if a minute of silence is constructed in significant part to facilitate prayer, the appearance of government endorsement of religious activity within the schools impermissibly advances religion. Indeed, the juxtaposition of voluntary religious practice with a government operated school system has frequently been deemed to provide a symbolic benefit to religion inconsistent with the establishment clause. *See, e.g., Engle v. Vitale*, 370 U.S. 421 (1962) (voluntary school prayer); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (released time for instruction within the public school building).

Appellees acknowledge that *Jaffree* contains language suggesting that some Justices of this Court are willing to uphold some moment of silence laws. Consequently, in contending that A-1064 carried the impermissible effect of advancing religion, Appellees do not rely merely on the fact that the state set aside a time within the public school classroom with the purpose (exclusively or predominantly) of facilitating prayer. We point instead to several factors involving the New Jersey statutory scheme which particularly impel the conclusion that A-1064 in application would directly advance religion.

A. Under The Minute Of Silence As Structured Pursuant To A-1064, Some Teachers Would Inevitably Utilize The Minute Of Silence For Prayer And Would Thus Influence Impressionable Children To Engage In Prayer

There was substantial testimony in the record indicating that some teachers would likely use the minute of silence flowing from A-1064 in order to pray, and that this would involve displaying the outward manifestations of prayer customary to their denominations. (J.A. 32-34, 45-46, 130-31, 159, 199, 217). For example, Professor of Educational Psychology Peter Kuriloff predicted that approximately 5% of teachers in a region such as New Jersey would be inclined to utilize a

morning minute of silence for prayer (J.A. 217), and that young children would be affected by teachers' cues. (J.A. 199).[21] In addition, the NJEA supported the view that the personal religious beliefs of some teachers would likely manifest themselves in a fashion (folded hands, bowed heads, and the like) which would influence young impressionable students. *See* Brief of NJEA, *amicus curiae*, in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 15, 18.

With regard to teacher utilization of a minute of silence to engage in prayer, there are significant differences between the situation in New Jersey under A-1064 and the situation in other states. In some jurisdictions, teachers have been issued instructions about how to handle the minute of silence—how to introduce it and how to respond to students' questions about it. *See Gaines v. Anderson*, 421 F. Supp. 337, 340 n.4. (D.Mass. 1976). In New Jersey, by contrast, the Legislature made A-1064 effective immediately upon passage (J.S.A. 111a), and no guidelines or instructions were made available with regard to implementation. On the day after A-1064 became effective, the Commissioner of Education simply informed district school superintendents that the "statute should be permitted to speak for itself." (J.A. 3d Cir. 19a).[22] Local superintendents had sought clarification from the Commis-

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21 Predictions rather than observations were necessitated because A-1064 was not actually implemented in many locales (*see* J.A. 233) between its passage on December 16, 1982 and issuance of a temporary restraining order on January 14, 1983. (J.A. 50).

22 One can surmise why the Commissioner of Education chose not to provide implementing guidelines or instructions. Apparently, the Commissioner shared the perception of the state's governor and attorney general that A-1064 was intended to promote prayer. To be faithful to the perceived statutory purpose, then, the Commissioner would have had to issue guidelines reflecting the prayer purpose of the bill. He chose instead to issue no guidelines.

There are several bases for this surmise. First, the Commissioner did not seek to defend the bill's constitutionality even though he was a named defendant in the suit. Further, a deputy attorney general represented to the district court that "the state defendants believed, as did plaintiffs, that the statute was unconstitutional." (J.A. 3d Cir. 90a).

sioner of Education, but drew no response. (J.A. 233; R. 325). The result was utter confusion.[23]

In the absence of either legislative or administrative guidelines explaining the approach which teachers were to follow in implementing A-1064, it was inevitable that the predictions mentioned above would in fact be fulfilled. That is, it was inevitable that some religiously oriented teachers would utilize the minute of silence to pray and thus would influence the impressionable children in their charge. For an illustration of the tendency of religiously oriented public school teachers to utilize a moment of silence exercise to influence schoolchildren, *see Walter v. West Va. Bd. of Educ.*, 610 F. Supp. 1169, 1171-73 (D.W. Va. 1985). *Cf. Grand Rapids School District v. Ball*, 473 U.S. 373, 384-85 (1985).

The custom of opening the school day with prayer had survived in New Jersey up until the early 1960's—within the memory of many teachers, parents, and administrators. (J.A 355; J.S.A. 67a, 86a). The message implicit in the Legislature's particular selection of a silent period *at the beginning of the school day* did not go unnoticed by New Jersey's educators. *See* Brief of NJEA, *amicus curiae*, in *May v. Cooperman*, #83-89 (D.N.J. 1983), at 13, 18. In short, the placement of the silent minute at the beginning of the school day, along with the total absence of guidelines for implementation of A-1064, meant that A-1064 would directly result in some teachers engaging in prayer and thus influencing their impressionable charges to follow suit.

B. Because The Universal Public Perception Of A-1064 Was That Its Purpose Was To Encourage Prayer, That Law Had The Inevitable Effect Of Advancing Religion

If the public reasonably perceives that state government has endorsed a religious exercise in public school classrooms, the effect of the government action is the advancement of religion.

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23 In some New Jersey localities, the minute of silence law was not implemented at all. (J.A. 233). In some locales, it was implemented as a mandatory exercise. (J.A. 25-26, 39-40). In another locale, students were told to stand up, close their eyes, and lower their heads during the minute of silence. (R.156).

See Jaffree, 472 U.S. at 76; *Duffy*, 557 F. Supp. at 1016; Note, 96 Harv. L. Rev. 1874, 1888 (1983). In the case of A-1064, there was considerable evidence that the bill was widely perceived as a mechanism to reintroduce prayer into the schools. Evidence indicated that this was a common perception among students, parents, teachers, and administrators. (J.A. 28, 39-40, 43, 45, 229, 234; R. 323-24). Several important organizations such as the NJEA (teachers' union), the NJSBA (schoolboards' association), and the NJSAA (school administrators' association) fully shared this perception of A-1064's purpose. (J.A. 377, 282; R. 320-21).

These perceptions were solidly grounded. They flowed from the fact that the legislative history and background of A-1064 were suffused with a legislative preoccupation with prayer in the schools. (*See* Point II, *supra*). That legislative history and focus were brought home to the general public in a variety of ways. First, the governor and the attorney general had each branded A-1064 as an illicitly motivated measure.[24] Second, the press reports concerning the legislative debates over A-1064 confirmed this message—that A-1064 was intended to return prayer to the public schools. Third, editorials in eight of the state's largest newspapers unanimously proclaimed that A-1064 was a transparent effort by the legislature to return prayer to the public schools. (Plaintiffs' Exh. 27, 29, 30, 35-37, 40-42, 44-45, 47, 49).

Despite the Legislature's clear awareness of the widespread perception of A-1064 as a prayer measure,[25] it did nothing to

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24 A deputy attorney general later commented on the degree of publicity that the attorney general's decision not to defend A-1064 had received. She mentioned that the announcement had been carried in virtually every state newspaper as well as on radio and T.V. broadcasts originating in New York and Philadelphia. (J.A. 3d Cir. 84a). She observed: "Just about everyone in the state was aware of the executive branch's position regarding the constitutionality of this statute [A-1064]." (*Id.*).

25 The New Jersey Baptist organization had sent mailgrams to every legislator urging them not to override the governor's veto because Bill A-1064 was regarded as unconsitutional. (R. 296-97). The New Jersey Council of Churches (representing 3500 churches) had likewise communicated with the

dispel the notion that A-1064 was intended to return prayer to the public schools. This silence stands in sharp contrast to other states in which legislators have included explicit statutory language disclaiming that their moment of silence laws are intended to endorse prayer. *See* Note, 58 N.Y.U. L. Rev. 364, 396 (1983) (listing six states whose moment of silence laws contain a disclaimer of any intention to promote religious exercises).

In the face of a public perception that A-1064 was aimed at reintroducing prayer in the schools, the Legislature neither disavowed this object nor provided implementation guidelines which might have dispelled any notion of a state imprimatur upon prayer. Because of the clearcut and reasonably based public perception of A-1064's purpose, the bill must be deemed to carry the impermissible effect of advancing religion.

There were also locales in which the minute of silence was administered as a mandatory exercise. (J.A. 25-26, 39). In such places, the influence of the state-organized exercise would be patent. There, impressionable schoolchildren would be affected by some peers' praying and using the traditional indicia of prayer such as folded hands and bowed heads. That each child would be free to decide whether to pray does not obviate the indirect pressure upon non-religious minorities to conform. "The law of imitation operates, and non-conformity is not an outstanding characteristic of children." *Jaffree*, 472 U.S. at 60 n.51 (quoting *McCollum*, 333 U.S. at 227). Inevitably, some children would pray because of the perceived message from the existence of the silence exercise. Other children would be subject to the peer pressure that accompanies even voluntary prayer.

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legislators, urging them not to override the veto because A-1064 was seen as "an attempt to circumvent" Supreme Court decisions. (R. 302-03). The NJEA (teachers' union) had used its five lobbyists to convey to the Legislature the union's position that A-1064 constituted "a backdoor approach to bringing prayer into the schools." (J.A. 376-77).

IV. ON THIS RECORD AND AS A MATTER OF ESTABLISHMENT CLAUSE JURISPRUDENCE, A-1064 CANNOT BE SUPPORTED BY A LEGISLATIVE PURPOSE TO ACCOMMODATE RELIGION

Some *amici* have suggested to this Court that A-1064 might be sustainable on the basis that its purpose was to accommodate religious practice by providing students with an opportunity to pray. *See, e.g.*, Brief for the United States, at 15-21; Brief for the Catholic League for Religious and Civil Rights, at 9-10. This suggestion is untenable for a number of reasons.

First, Appellants never asserted such a claim and would be barred from doing so at this juncture. The Legislature which intervened to defend A-1064 never argued that the actual legislative purpose was to provide an opportunity for some students to pray. To the contrary, during trial the Legislature advanced a single justification for its minute of silence law—provision of a calming transition from the bustle of the playground. (J.S.A. 82a). Appellants continue to defend A-1064 on the ground that it provides a transition period into the school day. (App. Br. at 13). *See also* Juris. Statement at 21 n.10 (arguing that the Third Circuit was wrong in attributing an accommodation purpose to A-1064).

Appellees focused considerable efforts at trial on repudiating the sole proffered legislative purpose—a transition period. They succeeded to the satisfaction of both the district and circuit courts in showing that the sole justification advanced for the statute was a pretext. (J.S.A. 87a; 27a). The injection of an "accommodation" defense at this stage would relegate the efforts of the trial court to an exercise in futility. That court's whole perspective of this case was shaped by good faith reliance on the Legislature's representations and proofs as to purpose. *Amici curiae* cannot at this point be permitted to alter the whole defense. *See Witters v. Washington Dep't for the Blind*, 106 S.Ct. 748, 751 n.3 (1986).

Second, an accommodation purpose is a legitimate basis for an enactment only where government is either eliminating an obstacle to free exercise, or is seeking to afford even-handed treatment to religion while administering government benefits.

See, e.g., Hobbie v. Unemployment Appeals Comm'n, 107 S.Ct. 1046, 1051 (1987) (state may treat Sabbatarians in common with Sunday observers for purposes of an unemployment compensation program); *Witters*, 106 S.Ct. 748. In the absense of some obstacle to free exercise, or in the absence of some spectre of uneven treatment of religion, a governmental effort to accommodate religious practice exceeds establishment clause bounds. If government intervenes just to facilitate a religious practice, the government's power and prestige is arrayed behind the religious practice in a manner conveying a message of support or endorsement. *See Stone v. Graham*, 449 U.S. 39 (1980).

The hazard of such an implicit message is particularly obvious in the setting of impressionable schoolchildren. If a state were to provide chapels within public school buildings, the message reinforcing private religious practice would be enough to trigger the establishment clause. The governmental provision of a special time within the classroom solely or primarily in order that students have a special opportunity to pray, with teachers ensuring that all students maintain the decorum necessary for such prayer, is similarly liable to carry with it a message of endorsement. This message is particularly powerful where a purported secular usage of the time provided is a mere pretext, and no guidelines explain or confine implementation of the silent period.[26]

The record here is devoid of any indication that schoolchildren in New Jersey have so few quiet moments during the school day that there exists a significant obstacle to a moment of prayer. Indeed, the record indicates that opportunities customarily exist within the school day in which students might

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26 This was essentially the thrust of Judge Gibbons' majority decision in the Third Circuit. He treated the legislative purpose behind A-1064 as accommodation. He then invalidated the statute because he agreed that plaintiffs had demonstrated that no other "secular" purpose underlay the statute, and because pure accommodation of prayer in the public schools would violate the Establishment Clause. (J.S.A. 29-30a). Appellees disagree with Judge Gibbons' conclusion that accommodation was the purpose of A-1064. But we agree with his conclusion that if accommodation of prayer was the exclusive or predominant purpose of A-1064, then the measure is unconstitutional.

silently meditate or pray. (J.A 241, 249; J.A. 3d Cir. 643a). Logic also dictates that study halls, recess, or other unstructured moments can be utilized by a student for individual silent prayer. *See* Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 Yale L.J. 1631, 1637 (1986). And, of course, students are completely free to pray before or after the school day. In short, there was no showing of any lack of opportunity for children to pray before, after, and during the school day.

Any state which accommodates prayer in the schools without any indication that there are obstacles to prayer risks conveying a message that the state endorses and encourages prayer. When, as here, the state issues no guidelines conveying a secular object of the period of silence, and issues no disclaimer of an object to encourage prayer (in the face of a wide public perception that the object is to promote prayer), the risk becomes a reality. The state is in fact conveying a message encouraging prayer.

There exists a third reason why A-1064 cannot be salvaged as an accommodation of prayer measure. The district court made findings, well grounded in the record, that the purpose of A-1064 was religious. (J.S.A. 86a-94a). Careful reading of Judge Debevoise's opinion shows that by "religious" he meant that the legislative purpose was to advance religion by returning prayer to the public schools, clearly an illicit purpose going beyond mere accommodation.[27] For example, Judge Debevoise referred to a series of prior meditation and moment of silence bills as "attempts to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling"; he then found that A-1064 "is but the most recent of such bills motivated *by these sentiments*." (J.S.A. 86a-87a (emphasis added)). Judge Debevoise based his conclusion that A-1064's purpose was

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27 "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer . . . ." *Jaffree*, 472 U.S. at 59.

Judge Debevoise determined not only that A-1064 "mandate[d] a period at the start of each school day when all students would have an opportunity to engage in prayer," (J.S.A. 86a), but also that the purpose was to reintroduce prayer to the schools in an unconstitutional manner. *Id.* at 87a, 90a, 92a.

"religious, not secular," in part on evidence such as the Legislature's prior efforts to evade *Abington* by reintroducing "a mandatory time for prayer in the public schools." (J.S.A. 90a). After ruling that the overall circumstances of A-1064's adoption "point inescapably to an essentially religious purpose," Judge Debevoise added:

> The statements of the legislators in committee, in the floor and to the public as disclosed by the evidence in this case are consistent with and confirmatory of an institutional purpose to accomplish something the Constitution forbids.

(J.S.A. 92a). In short, the district court determined that the purpose of A-1064 was not simply to accommodate students wishing to pray, but to promote religion by returning prayer to the public schools in contravention of this Court's dictates.[28] This purpose of encouraging a religious exercise was, as *Jaffree* establishes, constitutionally impermissible. 472 U.S. at 59-60.

Fourth, the New Jersey minute of silence format, while providing an opportunity for some students to pray if they choose, imposes a burden both on persons wishing to use

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28 Judge Gibbons' majority opinion in the Third Circuit commented: "we do not believe a finding that the religious purpose was to encourage prayer over other alternatives rather than to accommodate, would be sustainable." (J.S.A. 29a). This conclusion was apparently grounded on a view that if the minute of silence statute was permissive in nature—*i.e.*, did not require students to participate in the silence exercise—it could not be deemed to be aimed at encouraging or endorsing prayer. (*Id.* at 27a-28a). Appellees submit that this view was erroneous. If the Legislature installed a voluntary and permissive exercise with the purpose of returning prayer to the schools, that would be an illicit legislative purpose even though the means chosen (a voluntary exercise) would be less offensive than installation of a mandatory exercise. *See Engle v. Vitale*, 370 U.S. 421, 431 (1962). *Cf. Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (initiation of an elective course in transcendental meditation violates the establishment clause). Moreover, the Third Circuit upheld the district court finding that A-1064 had no secular purpose. (J.S.A. 27a). This effectively meant that the only non-prayer purpose submitted by the Legislature had been refuted, thus leaving intact the inference that the Legislature was only concerned about prayer. If a legislature sets aside a time for prayer without developing or communicating a secular use for the time period, the inevitable effect is to advance prayer.

sound or movement in their prayer and on persons who have conscientious objections to prayer in the classroom. Testimony at trial demonstrated that there are many religious sects which utilize modest amounts of noise (such as chanting) or body movements in their prayers. (J.A. 143-44, 159). The trial court accordingly found that while A-1064 might offer a chance for some persons to engage in silent prayer, it would preclude "others whose prayers require action and/or sound" from utilizing the same classroom locale for prayer. (J.S.A. 88a, 96a). Though these other persons could probably be "accommodated" in school locations outside the classroom, that could be done only at the cost of leaving the classroom and thus losing some class time.[29] A veteran school administrator testified that accommodating objectors to the minute of silence would take up much more than a minute and would take additional time away from instructional purposes. (J.A. 239-41). What this illustrates is that if prayer is to be accommodated in the public school building, designated places outside the immediate classroom must be utilized. Otherwise, the minute of silence becomes a quasi-sectarian exercise accommodating students of some religious persuasions but inconveniencing persons of other persuasions and conscientious objectors.[30]

V. THE DISTRICT COURT'S FINDINGS THAT A-1064 HAD NO SECULAR PURPOSE AND THAT ITS PREEMINENT PURPOSE WAS TO REINTRODUCE PRAYER IN THE PUBLIC SCHOOLS ARE FACTUAL FINDINGS SUBJECT TO RULE 52(a)'s "CLEARLY ERRONEOUS" STANDARD OF REVIEW

Appellants use *Bose Corp. v. Consumers' Union*, 466 U.S. 485 (1984) to argue that a finding of illicit religious purpose (or

29 Similarly, students with conscientious objections to prayer in the classroom could presumably leave the room to avoid exposure to any religious exercise. Again, this could be accomplished only by losing some time from the class day.

30 The record shows that in addition to the Plaintiffs-Appellees who filed the instant suit, there were other conscientious objectors to A-1064. (J.A. 232, 239-40).

of no secular purpose) represents an "ultimate constitutional fact" (App. Br. at 43), and that "questions of constitutional fact compel an appellate court's *de novo* review of the record." (*Id.* at 46). Even if the Court were to conduct a *de novo* review of the record in this case, the district court findings of illicit purpose should be upheld. However, the proper standard of review of the district court's findings of fact is Fed. R. Civ. P. 52(a)'s "clearly erroneous" rule. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Appellants' effort to expand the limited exception to Rule 52(a) announced in *Bose* is not supported by any pronouncement of this Court.

Bose holds that a finding of "actual malice" in a libel proceeding must be subjected to independent appellate review. While *Bose* cannot be confined to libel cases, the opinion indicates that its teaching is limited to the free speech area. The Court, relying on precedents treating fighting words, incitement to riot, contempt of court, obscenity, and child pornography, concluded that independent appellate review of a record is necessary in First Amendment speech cases in order to ensure "that the judgment does not constitute a forbidden instrusion on the field of free expression." *Bose*, 466 U.S. at 499.[31]

Bose also reflects an overriding interest in ensuring that constitutional rights will not be unduly restricted by the lower courts. *Bose* states that independent appellate review may be necessary in free expression cases "to confine the perimeters of any unprotected category within acceptably narrow limits . . . to ensure that protected expression will not be inhibited," *id.* at 505, and "in order to preserve the precious liberties established

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31 Since *Bose* was decided, this Court has explicitly refused to expand its limited call for independent appellate review to cases involving claims of unconstitutional vote dilution, *see Thornburg v. Gingles*, 106 S.Ct. 2752, 2781 (1986), and discrimination against interstate trade, *see Maine v. Taylor*, 106 S.Ct. 2440, 2451 (1986). The Court in these instances refused to extend *Bose* even though the findings involved dispositive issues of constitutional fact. The only post-*Bose* decision of this Court which does authorize independent appellate review is *Miller v. Fenton*, 106 S.Ct. 445 (1986). *Miller* relied upon fifty years of unbroken Supreme Court precedent holding that voluntariness of a confession is a legal question requiring independent federal determination. *Id.* at 450. *Miller*'s rationale is wholly unrelated to a district court's finding of actual purpose in an Establishment Clause case.

and ordained by the Constitution." *Id.* at 511. Thus, *Bose* reflects the Court's conviction that the appropriate division of responsibility requires judges—"and particularly members of this Court," *id.* at 501—to engage in independent appellate review of lower courts' *denials* of federal constitutional rights. Because the district court here vindicated the right to be free from establishment of religion, independent review is inappropriate.[32]

Even if independent appellate review is not confined purely to free speech issues, or to cases in which a constitutional right was denied in the trial court, its reach cannot be extended to a finding of illicit legislative purpose. As a first principle, it is important to note that labeling an issue as a "constitutional fact" or "an ultimate fact" does not alter the "clearly erroneous" standard of review. *See, e.g., Maine v. Taylor*, 106 S.Ct. at 2451; *Dayton Board of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979). Rather, the issue is one of proper allocation of judicial responsibility. *See Miller v. Fenton*, 106 S.Ct. 445, 451-52 (1985); Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 234-39 (1985).

Actual legislative purpose is a factual question whose resolution hinges on determination of various subsidiary facts. A district court finding on legislative purpose ought therefore to be subject to the "clearly erroneous" test of Rule 52(a).[33] This

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32 No one has argued that the free exercise clause *requires* moments of silence in the schools. Hence, a finding concerning establishment here does not infringe any citizen's free exercise rights.

The *Bose* Court was obviously troubled by the fact that the district court had created a rule of inference to determine actual malice, a rule with which the Court disagreed. In this respect, *Bose* stands in stark contrast to the district court's finding of illicit purpose in the instant matter. That finding was not based on any inferential rule of general applicability, but on a specific conclusion that the asserted secular purpose of the legislation was a pretext and on a record replete with direct evidence that the actual purpose of the law was to return prayer to the public schools.

33 Whether the factual finding is grounded on credibility of witnesses, documentary evidence, or inferences from subsidiary facts, the rationale for the clearly erroneous standard is still applicable. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *see* C. Wright, *Federal Courts*, ¶ 96, at 648-49 (4th ed. 1983). But where, as here, findings also are grounded on

Court has consistently indicated that district court findings concerning illicit purpose of government decision-makers—for example, purposeful racial discrimination—are subject to the "clearly erroneous" scope of review. In *Roberts v. Lodge*, 458 U.S. 613 (1982), the "clearly erroneous" standard was applied to a district court finding that an at-large election system had been maintained by the governmental body for invidious purposes. *Id.* at 622-23. That standard was applied not just to subsidiary questions of fact, but also to the ultimate factual inference of purposeful discrimination. *Id.* at 623-24. *See also Anderson*, *supra* (government discrimination in hiring).[34]

The same considerations dictating application of a "clearly erroneous" standard to factual findings of racially discriminatory purpose dictate application of an identical standard to findings of religious purpose. *See Lynch*, 465 U.S. at 680-81; *id.* at 704 n.11 (Brennan, J., dissenting). Both areas involve the application of a settled constitutional norm to disputed facts—grist for the mill of federal district courts. The substantive issue under review here does not implicate the kind of fluid constitutional norm which dictates independent appellate review.[35] *Jaffree* fixes the relevant norm in administering the "purpose prong" of establishment clause jurisprudence. A legislative measure will be invalidated if shown to lack a genuine secular purpose, or if "government's actual purpose is to endorse or disapprove of religion." *Jaffree*, 472 U.S. at 60-61.

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assessments of the credibility of witnesses, the district court's unique role in determining demeanor and tone of voice demands even greater respect under Rule 52. *Anderson*, 470 U.S. at 574.

34 "Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education v. Brinkman* * * *, the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly erroneous rule." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

35 The evolution and elaboration of a dynamic constitutional norm warrants independent appellate review. *See* Monaghan, *supra*, 85 Colum. L. Rev. at 236, 242, 264-68.

In the instant case Appellants advanced only one legislative purpose before the district court—to impose a transition period between the playground and the rest of the school day. (J.S.A. 82a). After consideration of extensive evidence, including the testimony of numerous witnesses, the district court concluded that this rationale was an after-the-fact pretext and that A-1064 therefore had no secular purpose. (J.S.A. 87a). This finding constitutes a finding of pure fact. It encompasses no legal standards; it is a factual rejection of the Appellants' asserted rationale as a sham.

The district court also made a factual finding that the actual purpose of A-1064 was to advance religion by reintroducing prayer to the public schools. This issue of actual legislative purpose is also a question of pure fact, based in turn on a great number of subsidiary factual findings of the district court. It is in no part a legal question, in no part a judicial balancing of social values. It is a finding of the actual intent of a collective body after an extensive evidentiary hearing by the court which has the greatest expertise and experience in weighing the evidence (and is in the best position to judge the credibility and demeanor of the witnesses who testified). *Cf. Anderson*, 470 U.S. at 574. As such, the district court's finding is indistinguishable from the countless findings of unconstitutional purpose that have been reviewed by this Court under the "clearly erroneous" standard. *See, e.g., Thornburg v. Gingles*, 106 S.Ct. 2752 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982).

CONCLUSION

For the reasons set forth herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 85-1551

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Intervenors-Appellants,

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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TABLE OF AUTHORITIES

Cases	Page
Bob Jones University v. *United States*, 461 U.S. 574 (1983)	3, 6
Diamond v. *Charles*, 106 S. Ct. 1697 (1986)	3, 4
Donaldson v. *United States*, 400 U.S. 517 (1971)	2
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	5
Immigration and Naturalization Service v. *Chadha*, 462 U.S. 919 (1983)	3, 5, 6
NAACP v. *New York*, 413 U.S. 345 (1973)	2
Pusey & Jones Co. v. *Hanssen*, 261 U.S. 491 (1923)	4
United States ex rel. Texas Portland Cement Co. v. *McCord*, 233 U.S. 157 (1914)	4
United States Steel Corp. v. *EPA*, 614 F.2d 843 (3rd Cir. 1979)	4
Other Authorities	
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	1
L. Tribe, *American Constitutional Law* (1978)	5

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1. Appellees do not dispute the two central issues raised by the motion to intervene: whether intervention in the first instance in this Court is appropriate and, if so, whether movants satisfy the standards for intervention in this Court at this time. The motion to intervene demonstrates clearly that the answer to both questions is yes.

Appellees concede that where the "interests of justice" will be served, "this Court clearly has authority to permit a party to intervene in the first instance in this Court." Appellees' Opp. at 5; see R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* at 339-40 (6th

ed. 1986). In the present case, Movants clearly meet the requirements of the three-part test for intervention of right in the federal courts, see Motion to Intervene, vi-ix, and should be allowed to intervene to represent their interests. See *Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971).[1]

Rather than address the intervention issue, Appellees attempt to shift the Court's attention to Movants' "standing." They begin by asking the Court to assume at this time that the named Appellants lack standing to pursue this appeal. Thus, Appellees, who as plaintiffs initiated this action, now seek to avoid review by this Court—and thereby preserve the erroneous judgment below—by challenging the standing of the Defendants/Appellants, against whom they have litigated for four years, and also the standing of the Movants, the real beneficiaries of the statute at issue. The interests of justice are hardly served by the simultaneous argument that 1) the

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[1] Appellees suggest (Opp. at 2 n.2) that intervention might not be appropriate only because the motion to intervene was not timely. However, as Appellees recognize, "timeliness is to be determined from all the circumstances." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). The issue is not, as Appellees assert, whether Movants have been "aware" of the litigation for any period of time. Appellees' Opp. at 2. On the contrary, the issue, under the appropriate standards for intervention, is whether—at the time of filing—movants have acted timely to protect their interests which are not otherwise "adequately represented." Until the issue of the named Appellants' standing recently was raised, Movants had no reason to believe that their interests would not be adequately represented by the legislature that passed the statute. In addition, the real concern of the timeliness requirement is possible "prejudice" to the parties, but appellees do not even claim that movants' intervention at this time would prejudice them in any way.

Appellees' interpretation of the timeliness requirement would force private beneficiaries of state statutes to intervene at any early stage of any litigation challenging "their" statute in order to guard against the possibility that at some future time the state's representation might become inadequate.

present Appellants lack the requisite personal stake in the outcome and 2) the Court should not permit intervention by others who clearly have such a stake.

2. The issue of the Appellants' standing has been preserved until briefing on the merits. It need not and should not be decided prematurely in this motion to intervene. Moreover, even if the Court were to hold that Appellants lack standing, the Movants possess the necessary interest to defend the statute in this Court and should be allowed to intervene for that purpose. The Appellees have suggested no disadvantage either to the Court or the parties from these Movants' participation as intervenors. Because the premise of Appellees' objection to intervention (the Appellants' standing) will not be decided until briefing on the merits, there is nothing to lose and much to gain from granting the motion to intervene.

The Appellees' wooden and technical claim that Article III does not permit the defense of a legislative act by parties other than the original defendants ignores this Court's precedents. For example, in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 935-36 (1983), neither of the named parties—the INS nor Mr. Chadha—defended the constitutionality of the legislative veto provision there at issue. The House and Senate were permitted to intervene for that purpose. See also *Bob Jones University* v. *United States*, 461 U.S. 574 (1983) (*amicus curiae* specially appointed by the Court to argue in support of federal regulation where government refused to defend regulation at issue).

Diamond v. *Charles*, 106 S.Ct. 1697 (1986), upon which Appellees place primary reliance, Appellees' Opp. at 3-4, does not stand for the proposition that only the state itself—through its current executive or legislative officers—may defend the constitutionality of a state statute in this Court. *Diamond* instead stands only for the

well-recognized proposition that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Diamond*, 106 S.Ct. at 1704. Accordingly, Dr. Diamond was held not to have standing to seek review of the court of appeals' decision enjoining *enforcement* of a criminal statute regulating abortion.[2]

Unlike the Appellant in *Diamond*, Movants do not seek reversal of the ruling below in order to further some intangible interest in promoting their state's criminal laws. On the contrary, Movants Catherine and Ronald Sokalski seek to intervene to support a civil statute that directly protects their fundamental interest as parents in the education and development of their child. Movant Twylla Flanders seeks to intervene in support of her concrete interest embodied in the state statute in using a moment of silence in her classroom as a pedagogical tool.[3] The outcome of this appeal will determine whether Mrs. Flanders will be able to use a moment of silence without being subject to Section 1983 damage claims by

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[2] Other cases cited by the Appellees simply are not on point because they involve instances where there was a flaw in the original action *ab initio* and the court never had a valid claim before it. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157 (1914); *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 501 (1923). In the instant case, Appellees must concede that there was a valid case and controversy at least until the change in the legislative status of the named Appellants.

Thus, unlike the cases relied upon by Appellees where "the court lacked original subject matter jurisdiction," Appellees' Opp. at 6, the courts below clearly had jurisdiction over this case. If they did not, the judgments below would be void.

Appellees themselves cite the most relevant case, *United States Steel Corp.* v. *EPA*, 614 F.2d 843, 845-46 (3d Cir. 1979). In that case, an intervenor whose "interests . . . were related but not identical to those of the (original party)" was allowed to continue the litigation after the original party was dismissed. *Id.*

[3] Mrs. Flanders has used a moment of silence in the past and, if she is successful in this Court, she will do so in the future.

parents—like the Appellees in this case—who do not want a moment of silence in the schools. Thus, although Mrs. Flanders does not represent the State of New Jersey, she has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury . . . ." *Chadha*, 462 U.S. at 936 (quoting *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978)). In short, the outcome of this litigation will have tangible, concrete effects on the *conduct* of Mrs. Flanders and the Sokalskis (on behalf of their minor daughter).[4] Accordingly, Movants have standing to intervene and protect their own interests and the public interest underlying the statute. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); see L. Tribe, *American Constitutional Law*, 105-106 (1978).

If the Appellants here had prevailed in the court of appeals (so that the statute was upheld) and Appellees had brought the appeal to this Court, the fact that the

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[4] Appellees suggest that there is no "case or controversy" *between* movant Twylla Flanders and the Plaintiffs/Appellees because "[Mrs. Flanders] failed to allege that any of the plaintiffs in this suit are students or parents in the school where she teaches. . . ." This narrow view of the standing doctrine ignores the fact that Appellees sought *statewide* relief barring use of the moment of silence statute. If Appellees can assert their own standing on a statewide basis, they should not be permitted to use the fact that an intervenor resides in a different county to defeat that intervenor's standing.

Moreover, Appellees overlook the fact that Mrs. Flanders seeks to intervene "as an appellant in ~~this matter,~~ on behalf of myself and other public school teachers in New Jersey who support the New Jersey moment of silence statute." Affidavit of Twylla Flanders at 6a. Unless Appellees concede that their own complaint (which was not a class action) was not ripe, they must believe that at least some of the teachers at the relevant schools (which plaintiffs attend) intend to employ a moment of silence statute pursuant to N.J.S.A. 18A:36-4. Mrs. Flanders simply stands in that person's place for purposes of deciding whether there is a case or controversy.

legislative and the executive branches of the State of New Jersey no longer had an interest in defending the law would not require this Court to declare the statute unconstitutional. Certainly in that situation Appellees would not urge, as they do here, that the Court should dismiss the lawsuit for want of a case or controversy. To the contrary, the Court would permit or invite someone to defend the law. See *Bob Jones*, *supra*, at 3; *Chadha*, *supra*, at 3. The result should not be different when the statute has been struck down judicially —but not repealed legislatively—at least when representative individuals for whose benefit the statute was enacted seek to intervene to defend the state's law against the constitutional attack. See L. Tribe at 114 (dismissal for lack of standing "seems appropriate only when the court concludes that there are insurmountable obstacles to identifying the absent but legally relevant interests and securing adequate advocacy of those interests").

The position which Movants espouse is fundamentally fair because it allows the parties with the most direct interest in the statute to defend its constitutionality without interfering with the ordinary political processes. If the current legislature wishes to do so it can repeal the statute at any time and render this litigation moot. In the absence of such action, the statute should remain in effect, if constitutional. Its direct beneficiaries include parents of school aged children and teachers of those children who desire the benefits of a moment of silence. Their interests are personal and concrete and will be lost if the lower court's erroneous decision is permitted to stand. Thus, these Movants not only have a stake in the outcome: according to the Appellees, no other party before the Court who supports the statute has such a stake. Considerations of fairness to the parties affected by the statute, respect for state legislative enactments, and the orderly procedure of this Court all require that the motion to intervene be granted.

CONCLUSION

For the foregoing reasons and those stated in the motion for leave to intervene, intervenors-appellants' motion for leave to intervene should be granted.

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No. 85-1551

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER,
as Speaker of the New Jersey General Assembly, *et al*,

Appellants,

—vs.—

JEFFREY MAY, individually, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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8 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

ARGUMENT

I. THIS COURT'S DECISION IN *AGUILLARD* STRONGLY SUPPORTS THE JUDGMENT BELOW 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

PAGE

Corporation of Presiding Bishop v. Amos, 55 U.S.L.W. 5005 (June 24, 1987) 5

Edwards v. Aguillard, 55 U.S.L.W. 4860 (June 19, 1987) ..... *passim*

Lemon v. Kurtzman, 403 U.S. 602 (1971) 1, 3

Lynch v. Donnelly, 465 U.S. 668 (1984) 2

Wallace v. Jaffree, 472 U.S. 38 (1985) 2, 3, 4, 5

Pursuant to Supreme Court Rule 35.5, appellees file this Supplemental Brief in light of this Court's opinion in *Edwards v. Aguillard*, 55 U.S.L.W. 4860 (June 19, 1987), which was decided after the filing of appellees' principal brief.[1]

ARGUMENT

THIS COURT'S DECISION IN *AGUILLARD* STRONGLY SUPPORTS THE JUDGMENT BELOW

In *Aguillard*, this Court held that the Louisiana Creationism Act violated the Establishment Clause under the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). While the opinion in *Aguillard* did not alter preexisting law, it clarified several important questions concerning the proper analysis of legislative purpose.

Much of appellant's brief on the merits in this case is devoted to disputing the propriety of the district court's method of analyzing legislative purpose. *Aguillard* resolves such questions in favor of appellees and thus strongly supports the conclusion that New Jersey's minute of silence law is unconstitutional.[2]

First, *Aguillard* reinforces this Court's prior holdings that the purpose prong of the *Lemon* test is violated if a statute's "primary" or "preeminent" purpose is to endorse religion. 55 U.S.L.W. at 4863. That is precisely the standard applied by the district court below. Specifically, the district court found that the primary purpose of New Jersey's minute of silence law is

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1 Appellees continue to assert that Appellant Karcher has no standing to pursue this appeal and therefore that this appeal must be dismissed for want of jurisdiction. *See Brief of Appellees* ("App. Br."), at 6-12. This Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. 93 L.Ed.2d 995 (1987).

2 The statute is cited in appellees' principal brief by its bill number, A-1064. This brief uses the same citation form.

"to introduce a mandatory time for prayer in the public schools." (J.S.A. 90a).[3]

Moreover, both the district court and Third Circuit found (J.S.A. 90a-91a; 27a-28a), as this Court found in *Aguillard*, 55 U.S.L.W. at 4862, that the state "identified no clear secular purpose for [its] Act." As noted in *Aguillard*, "[w]hen . . . 'both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.' " 55 U.S.L.W. at 4866 (Powell, J., joined by O'Connor, J. concurring), quoting *Wallace v. Jaffree*, 472 U.S. 38, 66 (1985) (Powell, J. concurring); *accord*, 55 U.S.L.W. at 4868 (White, J., concurring).

Second, the Creationism Act in *Aguillard*, like the statute at issue in this case, involved state legislation aimed at elementary and secondary public schools. In *Aguillard*, this Court once again noted that the public school system presents a "special context" for Establishment Clause analysis:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

55 U.S.L.W. at 4861 (footnote and citations omitted).

Third, in order to determine the " 'actual purpose' " of the Creationism Act, *id.*, quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), the *Aguillard* Court examined the statute's legislative history and historical context, even though the Act itself explicitly stated a secular purpose—to protect academic freedom. The Court emphasized that, whatever the stated purpose, "it is required that the

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3 The lower court opinions in this case are set forth in the appendix to the jurisdictional statement, which is cited herein as "J.S.A."

statement of such purpose be sincere and not a sham." *Id.* at 4862, citing *Jaffree*, 472 U.S. at 64 (Powell, J., concurring); and 472 U.S. at 75 (O'Connor, J., concurring).

The New Jersey minute of silence law contains no stated secular purpose. Nevertheless, foreshadowing this Court's approach in *Aguillard*, the district court analyzed the postenactment rationale proffered by the legislature to determine if that purpose was in fact pretextual.

Furthermore, the district court's inquiry into purpose utilized the same sources later cited with approval by this Court in *Aguillard*. For example, *Aguillard* heavily relied on the statements of the chief legislative sponsor of the Creationism Act as part of its inquiry into the statute's purpose. 55 U.S.L.W. at 4862-63 & nn.13-14 (discussion of statements of Senator Bill Keith). Similarly, appellees presented undisputed evidence that Assemblyman Zangari, the chief sponsor of the New Jersey minute of silence law, was motivated by a desire to return prayer to the public schools. (J.S.A. 68a-70a). And like this Court in *Aguillard*, the district court also considered the religious motives of "several of the most vocal legislators," 55 U.S.L.W. at 4863 n.13, besides the chief legislative sponsor. (J.S.A. 70-71a).[4]

In short, *Aguillard* rejects the argument urged by appellants here and by the dissent in *Aguillard*, 55 U.S.L.W. at 4876 (Scalia, J., dissenting), that legislative purpose cannot be determined by examining the statements of a statute's leading proponents. Such an approach, as the dissent itself noted, would effectively eliminate *Lemon's* purpose prong. *Id.*

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4 The fact that the New Jersey legislature does not keep official records of its deliberations cannot distinguish this case from *Aguillard*. If that were so, legislatures could effectively immunize themselves from judicial scrutiny of actions taken with an unconstitutional purpose. Plaintiffs produced the best available evidence of the legislative history—evidence that went unrebutted by defendants and that was unquestionably reliable.

Fourth, the *Aguillard* Court rejected as irrelevant "post-enactment testimony of outside experts," *id.* at 4864, regarding the statute's actual purpose. Unlike the Creationism Act, the minute of silence law had no articulated secular purpose at the time of enactment. Only after litigation began did the legislature first articulate an arguably secular purpose and locate experts to make its point. As in *Aguillard*, this Court should find such postenactment testimony "of little use in determining the [New Jersey] legislature's purpose in enacting this statute." *Id.*; *see also Jaffree*, 472 U.S. at 57 n.45, and at 75 (O'Connor, J., concurring).

Fifth, this Court recognized in *Aguillard* that the Creationism Act was part and parcel of a struggle by certain religious groups to oppose, for religious reasons, the teaching of evolution. Accordingly, the Court traced the law's historical context not only within the Louisiana legislature, but by recognizing its link with actions in other states as well. 55 U.S.L.W. at 4863 & nn.9-10; *id.* at 4866 (Powell, J., joined by O'Connor, J., concurring).

In determining the "actual purpose" of the minute of silence law, the district court quite properly considered appellees' evidence setting out "the historical context of the statute, and the specific sequence of events leading to passage of the statute." 55 U.S.L.W. at 4864 (citations omitted). The court below examined the history of legislative attempts to defy this Court's school prayer decisions and recognized that A-1064 was simply the culmination of an historical effort to reintroduce prayer into the public schools. (J.S.A. 68a, 86a-87a).

Sixth, *Aguillard* establishes that a statute's "actual purpose" can often be discerned by examining its actual need. Here, appellees demonstrated that New Jersey teachers have long had the authority to impose periods of silence if necessary to achieve legitimate pedagogical goals, (J.S.A. 87a-89a),[5] and that there are no obstacles to students who wish to engage in

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5 *See also*, Statement of Governor Kean and predecessors (J.A. 383, 394-97).

silent prayer during the school day. *Id.* Thus, A-1064 was unnecessary to achieve either the transitional period ultimately advanced by the legislature as its asserted rationale, or the "accommodation" purpose that various amici now attribute to it.[6]

As this Court noted in *Aguillard* on a remarkably similar record:

> The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origins of life. . . The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it.

55 U.S.L.W. at 4862, citing *Jaffree*, 472 U.S. at 59.

Here, as in *Aguillard*, the absence of any secular need for the statute strongly suggests that its "actual purpose" was to endorse religion in a manner prohibited by the Establishment Clause.[7]

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6 The "accommodation" rationale is raised for the first time before this Court. The legislature itself has explicitly rejected this as its purpose. *See* Juris. Statement at 21 n.10 (arguing that Third Circuit was wrong in attributing an accommodation purpose to A-1064). A rationale proffered four years after the fact by outside parties, and explicitly rejected by the Legislature itself is, at best, "of little use in determining the [New Jersey] legislature's purpose in enacting this statute." *Aguillard*, 55 U.S.L.W. at 4864.

7 The Court decided one other case under the Establishment Clause after appellees' brief was filed. *See Corporation of Presiding Bishop v. Amos*, 55 U.S.L.W. 5005 (June 24, 1987). In *Amos*, the Court found a permissible secular purpose of government neutrality and noninterference in private religious decision-making. *Id.* at 5008. Characterizing the statute in *Amos* as one that merely "allows churches to advance religion," the Court found no basis for the claim that "the *government itself* has advanced religion through its own activities and influence." *Id.* By contrast, the records in this case and *Aguillard* involve direct government efforts in support of religion without any secular purpose.

Assuming the Court reaches the merits of the present case, *Aguillard* reaffirms the propriety of the decision below.

CONCLUSION

For the reasons stated herein and in appellees' principal brief, the judgment below should be affirmed.

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Appellants,

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Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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TABLE OF AUTHORITIES

Cases:	Page
Abington School District v. *Schempp*, 374 U.S. 203 (1963)	14
Baker v. *Carr*, 369 U.S. 186 (1962)	5, 8
Bender v. *Williamsport Area School District*, 106 S. Ct. 1326 (1986)	5
Bob Jones University v. *United States*, 461 U.S. 574 (1983)	3, 4
Burke v. *Barnes*, 107 S. Ct. 734 (1987)	9, 11
Clements v. *Fashing*, 457 U.S. 957 (1982) (plurality)	3
Corporation of Presiding Bishop v. *Amos*, 107 S. Ct. 2862 (1987)	15
Duke Power Co. v. *Greenwood County*, 299 U.S. 259 (1936)	9, 10
Edwards v. *Aguillard*, 107 S. Ct. 2573 (1987)	12, 13
Engle v. *Vitale*, 370 U.S. 421 (1962)	13
Epperson v. *Arkansas*, 393 U.S. 97 (1968)	13
Everson v. *Board of Education*, 330 U.S. 1 (1947)	12
Flast v. *Cohen*, 392 U.S. 83 (1968)	4, 5
Flemming v. *Nestor*, 363 U.S. 603 (1960)	3
Gillette v. *United States*, 401 U.S. 437 (1971)	16
Gladstone v. *Village of Bellwood*, 441 U.S. 91 (1979)	5
Goldblatt v. *Hempstead*, 369 U.S. 590 (1962)	10
Hobbie v. *Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987)	15
Immigration and Naturalization Service v. *Chadha*, 462 U.S. 919 (1983)	4, 6, 7
Larson v. *Valente*, 456 U.S. 228 (1982)	17, 18
Lynch v. *Donnelly*, 104 S. Ct. 1355 (1984)	*passim*
Marsh v. *Chambers*, 463 U.S. 783 (1983)	16, 17
McGowan v. *Maryland*, 366 U.S. 420 (1961)	12
Meese v. *Keene*, 107 S. Ct. 1862 (1987)	6
Mueller v. *Allen*, 463 U.S. 388 (1983)	13
Schlesinger v. *Reservists to Stop the War*, 418 U.S. 208 (1974)	3, 8
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976)	5
Stone v. *Graham*, 449 U.S. 39 (1980)	12, 13

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Munsingwear*, 340 U.S. 36 (1950)	1, 9, 10, 11
United States v. *Richardson*, 418 U.S. 166 (1974)	2, 8
United States v. *SCRAP*, 412 U.S. 669 (1973)	8
United States Dept. of Treasury v. *Galioto*, 106 S. Ct. 2683 (1986)	9
Valley Forge Christian College v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982)	2, 4, 5, 8
Wallace v. *Jaffree*, 105 S. Ct. 2479 (1985)	*passim*
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970)	16
Warth v. *Seldin*, 422 U.S. 490 (1975)	2, 3, 4
Zorach v. *Clauson*, 343 U.S. 306 (1952)	15, 16

Miscellaneous:

L. Tribe, *American Constitutional Law*, 114 (1978)	3
C. Whittier, *Silent Prayer and Meditation in World Religions*, 7 (Cong. Research Service 1982)	17

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REPLY BRIEF OF APPELLANTS

I.

Appellees assert that the decision of the current leadership of the New Jersey Legislature to "withdraw" this appeal "ended the case or controversy upon which this Court's jurisdiction hinges." Appellees' Brief 12. But the basis of Appellant Karcher's Article III standing is not so fragile. Appellees ignore the fundamental difference between a *plaintiff's* standing to bring a lawsuit in the first instance and a *defendant's* standing to defend it on appeal. They also have failed to recognize the appropriate disposition of this case, under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), if this Court holds that there is no longer a case or controversy between the parties.

1. In an analysis of the standing of a defendant, it is necessary, at the outset, to recognize the critical distinction between *constitutional* limitations on standing

and the *prudential* constraints in the standing doctrine, a distinction that Appellees ignore.[1] See *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982); *United States* v. *Richardson*, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring). In the present case, the mere passage of time and a fortuitous shift in the State's legislative majority have operated to change Appellant's status in the eleventh hour of this lengthy litigation. Appellants submit that, under these unique circumstances, this Court should hold that Karcher[2] has standing to *continue to defend* the statute at issue if the Court finds that the minimum *constitutional* requirements of Article III continue to be satisfied.

Although prudential considerations might require a different result if Appellants attempted to assert such standing in the initiation of litigation, normal prudential concerns for limiting plaintiffs' standing are inapplicable in the present case, because only the standing of a *de-*

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[1] For example, Appellees argue that Karcher's injury is only a generalized grievance "shared by all citizens equally." Appellees' Brief 11. Even assuming arguendo that Karcher's claim was properly characterized as a "generalized grievance"—which it is not—the rule that a "generalized grievance" alone "normally does not warrant exercise of jurisdiction" is a *prudential* limitation on standing, not a constitutional barrier. See *Warth* v. *Seldin*, 422 U.S. at 499.

[2] Although the Brief of the United States as *Amicus Curiae* suggests that Appellant Orechio (President of the New Jersey Senate, 200th Legislature) "has not indicated any interest in pursuing the appeal before this Court," United States Br. 9 n.5, Appellant Orechio, in fact, retains his status as an Appellant in this case. However, because "his status is indistinguishable from that of Appellant Karcher," we will refer, in our arguments on standing, only to Appellant Karcher.

fendant is at issue. Thus, this is not a case in which a grant of standing will unnecessarily expand access to the federal courts. *Cf. Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974). Moreover, unlike the typical case, a denial of standing will not serve the purposes of judical self-restraint vis-a-vis the other branches of government, see *Warth*, 422 U.S. at 500-501. To the contrary, the judicial authority of the United States has already been exercised by the courts below. If this Court now simply refuses to act because of a perceived deficiency in Defendant Karcher's standing, it will leave in place the decision of a federal court invalidating a state statute. Given the usual presumption of the validity of state legislative actions, *Clements* v. *Fashing*, 457 U.S. 957, 963 (1982) (plurality); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), this Court should not decline to review the decision below—and thereby de facto declare this law invalid—unless it is clear that any decision in this case now would violate Article III.

Finally, equitable considerations demand that this Court not decline to review the decision below, absent constitutional obstacles to Appellants' standing. If Appellant Karcher had prevailed in the court of appeals (so that the statute was upheld), and Appellees brought this appeal to this Court, the fact that the leadership of the current New Jersey legislature had no interest in defending the statute would not require this Court to declare the statute unconstitutional. Certainly, in that situation, Appellees would not urge that the case be dismissed for want of standing. To the contrary, this Court would invite or permit someone to defend the statute. *Cf. Bob Jones University* v. *United States*, 461 U.S. 574 (1983); J.S. App. 99a-100a. The result should not be different when the statute has been struck down judicially—but not repealed legislatively—at least when representative individuals who meet the minimal constitutional standing requirements are available to defend the law against constitutional attack. See L. Tribe, *Ameri-*

can Constitutional Law, 114 (dismissal for lack of standing "seems appropriate only when the court concludes that there are insurmountable obstacles to identifying the absent but legally relevant interests and securing adequate advocacy of those interests") (footnote omitted).

2. Unlike the present case, all of this Court's major standing cases have focused on the standing of the plaintiff to invoke Article III jurisdiction.[3] Here, the Appellees are asserting their right to bring this litigation into federal court and then win by default because the defendants no longer possess standing to defend the statute.

Although the case law concerning a defendant's standing is sparse, what there is supports Appellants' right to defend this statute. For example, in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), there existed a genuine controversy, with concrete injury in fact. If the legislative veto provision was constitutional, then Chadha would be deported; if the veto provision was unconstitutional, then he would not be deported. But both parties to the lawsuit, the INS and Chadha, took the same position on the constitutionality of the legislative veto. Rather than allow the statute to be struck down because of the lack of a proper defendant, the United States House of Representatives and Senate were permitted to intervene (as defendants) to defend the Act's constitutionality.

Similarly, in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), there was a genuine controversy over the validity of the IRS regulations at issue, but neither of the named parties would take the position that the IRS regulations were valid. This Court appointed outside counsel for the specific purpose of pro-

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[3] See, *e.g.*, *Valley Forge Christian College*, 454 U.S. 464 (1982); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

viding a party who would defend the validity of the regulations.

For the reasons set forth below, we believe that Appellant Karcher meets the constitutional standing requirements—even for a plaintiff. However, we also submit that the standing rules are, and should be, more lenient for a party who merely defends the state action in question and thus, *a fortiori*, Karcher has standing in this case.

3. "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). The "irreducible minimum" Article III requirement is simply that the party in question demonstrate "that he personally has suffered some actual or threatened injury," *Gladstone* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979); *Valley Forge*, 454 U.S. 464, 472 (1982), and that the injury "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Thus, the "gist of the question of standing" is whether the party in question has "alleged such a personal stake in the outcome of the controversy [*i.e.*, "injury in fact"] as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); see *Bender* v. *Williamsport Area School District*, 106 S. Ct. 1326, 1332 (1986); *Valley Forge*, 454 U.S. at 472. Appellant Karcher clearly meets these constitutional standards.

Despite his loss of status as Speaker of the current New Jersey General Assembly, Karcher should be permitted to continue to defend the statute as representative of the 200th legislature—the body that enacted the statute at issue. At the very least, Appellant Karcher, as a

representative of the 200th legislature, has a direct stake in preventing the legislature's vote in favor of the statute from being invalidated in federal court (or in any other way) without resort to the legislative process.[4] If—as a general matter—the legislative branch has a sufficient interest in protecting its enactments to confer standing on the legislature to defend a statute when the executive branch refuses to do so, see *Chadha*, 462 U.S. at 935-36, there is no reason to suppose that the interest of the legislature that intervened in this litigation has lessened through the passage of time. The 200th legislature possesses the same personal, professional and reputational interest in defending its legislative acts as the United States Congress did in *Chadha*. That interest is sufficient to support a finding of injury in fact that provides standing to defend an act of that legislature that is declared unconstitutional. See *Meese* v. *Keene*, 107 S. Ct. 1862 (1987).[5]

Appellees do not claim that the Third Circuit's holding—that the 200th legislature acted unconstitutionally—did not injure Appellants' interest as the leadership (and representatives) of that body. Instead, they argue that allowing Karcher such standing is impermissible because it is "self evident" that the current legis-

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[4] Appellees' analysis fails to address the distinctions between the legislative positions involved here, which in essence represent the legislative body itself, and the fluid and individualistic executive branch positions that formed the basis of the development of the law on substitution of parties upon which Appellees rely.

[5] We are *not* suggesting that any individual legislator would have a sufficient interest at any time to defend any statute. The only issue is whether, and under what conditions, a subsequent legislative leader can nullify the "interest" of the previous legislature in a way that destroys standing. The current leadership—unlike Karcher and the 200th legislature—has the political opportunity to repeal the statute if it chooses (and if it can garner the votes). See, *infra*, p. 7. But, if this Court simply dismisses this appeal for lack of standing, Karcher lacks any political remedy, since reenactment of the statute is not a realistic possibility in light of the existing Third Circuit ruling.

lature (and not the 200th legislature) must have plenary control over this litigation. Appellees' Br. 12. But that proposition is far from evident. If, in fact, the 200th legislature had a sufficient interest to be allowed to intervene to defend the statute at the outset of this case, see *Chadha*, 462 U.S. at 935-36, there is no basis in reason or logic to conclude that the legislative interest has diminished simply because the litigation has spanned more than one legislative session.

Appellees also argue that permitting this litigation to continue under Appellants' theory of standing would undermine the will of the current legislature in favor of "dead hand control" by the 200th legislature. Appellees' Br. 12. But, granting Karcher standing in this Court in no way undermines or threatens the authority of the current legislature. If the current State legislative majority disagrees with the 200th legislature's decision to enact the moment of silence statute, it may express its disagreement and discontinue this litigation, at any time, simply by repealing the statute. Repeal—not manipulation of this litigation—is the appropriate action if, in fact, the current legislative majority disagrees with Appellant Karcher. Indeed, under our system of federalism, this Court should not allow itself to be used to achieve State aims which the State legislature itself is unwilling or unable to undertake. The fact that the State legislature has chosen not to take any steps to repeal the moment of silence statute indicates, at the very least, that it has acquiesced in the "dead hand control" of this issue exercised by the 200th legislature.

Finally, when measured against the underlying *purposes* of the Article III "injury in fact" requirement, Karcher's standing as a representative of the 200th legislature is clear. As described by this Court, the Article III requirement of a "case or controversy" has several purposes. The standing requirement (1) assures that issues are decided "in a concrete factual context conducive to a realistic appreciation of the consequences of

judicial action," *Valley Forge*, 454 U.S. at 472; (2) limits the precedential scope of the decision to the "actual factual setting" in which it is decided, *id.*; (3) ensures that federal judicial power will only be invoked by those with a direct stake in the outcome, *id.* at 473; *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973); (4) guards against "unnecessary" exercise of federal judicial power out of deference to the role of the "representative" branches of government and the private individuals affected by the exercise of federal judicial authority, *id.* at 473; *Schlesinger* v. *Reservists*, 418 U.S. at 222. A finding that Karcher has standing to continue to defend the moment of silence statute would be consistent with all of these recognized purposes of the standing doctrine.

First, because Karcher's standing was unchallenged at the time he intervened and at the time of trial, it is plain that the record upon which this appeal will be decided was developed with that "concrete adverseness which sharpens the presentation of the issues . . . ." *Baker* v. *Carr*, 369 U.S. at 204. Thus, any decision by this Court will be confined to the "actual factual setting" of this case, thereby satisfying the second standing requirement. Third, there is no doubt that Karcher and the 200th legislature (both at the time of intervention and presently) have a direct stake in the constitutionality of the New Jersey statute. See, *supra*, 6. Finally, a denial of standing in this case will not serve the purpose of avoiding "confrontation" between the federal judicial authority and the "representative branches." See *United States* v. *Richardson*, 418 U.S. at 188. To the contrary, if this Court simply refuses to act on the merits now, it will leave in effect the decision of a federal court invalidating a presumptively valid state law. Accordingly, every one of the underlying purposes of the standing doctrine identified by this Court would be advanced by permitting Karcher, in the unique circumstances of this case, to continue to defend the statute in his capacity as representative of the 200th legislature.

4. *If* this Court concludes that Appellants lack standing, under Article III, to continue to defend the New Jersey statute at issue, then the proper course for this Court is not simply to dismiss the appeal but instead to vacate the judgments below and remand with instructions to dismiss the complaint. *United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950); *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267-268 (1936); *United States Dept. of Treasury* v. *Galioto*, 106 S. Ct. 2683, 2686 (1986); *Burke* v. *Barnes*, 107 S. Ct. 734, 737 (1987).

In *Munsingwear*, the United States, as plaintiff, argued that the defendant was not entitled to a res judicata defense to the remaining count of a complaint where, after entry of judgment on the first count, the case became moot, thereby precluding appeal from that judgment. The United States contended that it would create an unusual hardship to force the government to accept the binding effect of a judgment where a change in circumstances prevented the government from challenging that judgment on appeal. This Court held that no such hardship was created because

> [t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39 (footnote omitted). The Court explained that this "procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance." *Id.* at 40.[6] Because the United States failed

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[6] The Court in *Munsingwear* noted that the procedure of vacating any judgment which becomes moot on appeal is not merely an option but is the "duty of the appellate court." *Id.* at 40 (quoting

to move to vacate the judgment below once it became clear that jurisdiction in the appellate court was lacking, the Court held that application of res judicata was permissible.

The principles enunciated by this Court in *Munsingwear* clearly are applicable to the present case. Because of the "changed situation"—not attributable to any of the parties—this Court's Article III jurisdiction over this controversy has been called into question, *cf. Duke Power*, 299 U.S. at 268. If this Court concludes that jurisdiction is lacking because of the change in Karcher's official status, the appropriate response under the *Munsingwear* doctrine is to vacate the judgment below and thereby prevent that "unreviewable" judgment from "spawning any legal consequences." *Munsingwear*, 340 U.S. at 41.[7]

Moreover, in light of the strong presumption that a duly enacted state statute is constitutional, *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962); see, *supra*, 3, this Court has a particular obligation not to leave in effect a judgment declaring a state law invalid after that judgment becomes unreviewable for jurisdictional reasons. The existence of an Article III controversy in the court of appeals simply is insufficient to sustain the judg-

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Duke Power, 299 U.S. 259, 267). Such a procedure preserves the rights of all of the parties and prevents any party from being prejudiced by an unreviewable judgment "spawning . . . legal consequences." *Munsingwear*, 340 U.S. at 40-41.

[7] The fact that the change in circumstances in *Munsingwear* involved "mootness" and the change in circumstances in this case allegedly involves "standing" is logically and legally irrelevant. In both cases, factors extrinsic to the litigation resulted in a federal appellate court being deprived of Article III jurisdiction and rendered the judgment below unreviewable. The requirement that the judgment below be vacated to clear the path for relitigation of the issues and to eliminate any consequences of the unreviewable judgment is the same in both cases.

ment below if jurisdiction is lacking in this Court. See *Burke*, 107 S. Ct. at 736 ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing"). Therefore, if this Court concludes that it lacks Article III jurisdiction over this controversy because of the change in Karcher's legislative status, the appropriate action is to vacate the judgment and remand to the court of appeals so that it may remand to the district court with instructions to dismiss the complaint. *Munsingwear*, 340 U.S. at 41.

II.

Appellees, in their argument on the merits, rely primarily on extrinsic evidence of the intent of individual members of the New Jersey Legislature to assert that the "actual purpose" of the moment of silence statute was to endorse or approve religion. Appellees' Brief, 26, 13-28. Appellees' argument, like the decision below, applies an improper legal standard for analysis of legislative "purpose" under the Establishment Clause and overlooks the clear legitimate purposes of the statute.

1. Appellees incorrectly assert that the purpose prong of the *Lemon* test is violated if it can be established that the "primary" or "actual" purpose of the statute is to endorse or advance religion, even if the statute on its face has a legitimate secular purpose. Appellees' Br. 13; Appellees' Supp. Br. 1. This simply is an incorrect statement of the law. It was not the job of the courts below [8]

[8] The court of appeals affirmed as "not clearly erroneous" the finding of the district court that the "statute, although facially neutral, had a religious and not a secular purpose." J.S. App. 26a. The district court's conclusion that the statute had "no overwhelming secular purpose" and an "essentially religious purpose" (J.S. App. 91a-92a) was based primarily on expert trial testimony establishing that the "silent minute has no legitimate pedagogical

to attempt to divine the "actual" legislative motivation or purpose of the New Jersey statute at issue—assuming that such a single purpose could be ascertained.

To the contrary, this Court repeatedly has instructed that the proper analysis under the "purpose" prong of the *Lemon* test is to determine whether the statute has *any* legitimate secular purpose.[9] *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1362 (1984). "Th[is] Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch*, 104 S. Ct. at 1362 (emphasis added); *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2490 ("even . . . a statute that is motivated in part by a religious purpose may satisfy the first criteria")

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value" (J.S. App. 27a), evidence regarding the history of allegedly "related" legislation and hearsay reports of the comments of *five* New Jersey legislators. J.S. App. 69a-70a.

[9] This is not to say that any articulated purpose is immune from scrutiny. The Court clearly has the authority to inquire if a purported legislative purpose is a sham. See *Edwards* v. *Aguillard*, 107 S. Ct. 2573, 2579 (1987); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980); *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2500 (O'Connor, J., concurring). But the "inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited," *Wallace*, 105 S. Ct. at 2500, and certainly should not involve attempts to derive the purpose of the legislation from after-the-fact testimony of interested persons and newspaper reports about statements by a handful of legislators. *Id.*; see *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *McGowan* v. *Maryland*, 366 U.S. 420, 466 (1961).

Nor is a "primary purpose" test necessary to ensure that statutes do not establish religion. If a statute's preeminent purpose is to promote religion, then the statute undoubtedly will have the effect of promoting religion in a manner that will fail the effects prong of the *Lemon* test. But, if the statute is facially neutral and has no impermissible effect, then searching judicial inquiry into legislative motives, such as that engaged in by the courts below, is wholly unwarranted. See *Wallace*, 105 S. Ct. at 2494 (Powell, J., concurring); *Id.* at 2500-2501 (O'Connor, J., concurring).

(citing *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring)); see also *Stone* v. *Graham*, 449 U.S. at 41; *Epperson* v. *Arkansas*, 393 U.S. 97, 107-109 (1968); *Engle* v. *Vitale*, 370 U.S. 421, 424-425 (1962).

Edwards v. *Aguillard*, 107 S. Ct. 2573 (1987), on which Appellees place substantial reliance, is not to the contrary. In *Edwards*, this Court invalidated the Louisiana Creationism Act only after finding "no clear secular purpose" for the Act. *Id.* at 2578. Indeed, the Court noted that both courts below were "unable to discern an *arguably valid* secular purpose." *Id.* at 2583 n.15 (emphasis added). This contrasts sharply with the decisions below in which the courts discerned at least two secular purposes for the New Jersey statute, but nevertheless struck the statute down on the basis that they discovered an "actual" sectarian purpose.

In short, the New Jersey moment of silence statute must be upheld "[e]ven [if] the benefits to religion [are] substantial" as long as there is a legitimate (non-pretextual) secular purpose for the statute. *Lynch*, 104 S. Ct. at 1362; see *Wallace v. Jaffree*, 105 S. Ct. at 2494 ("We have not interpreted the first prong of *Lemon* . . . as requiring that a statute have 'exclusively secular' objectives") (Powell, J., concurring). Such an analysis is motivated by this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983). By contrast, the Appellees' proposed analysis would require this Court to "balance" various legislative purposes to determine the "primary" or "actual" purpose of the statute.[10]

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[10] The searching inquiry advocated by the Appellees certainly would be the death knell of any state attempt to accommodate religious interests because any analysis of statutory purpose that "[f]ocus[ed] exclusively on the religious component of any ac-

2. New Jersey's moment of silence statute has at least two clearly discernible secular purposes. First, the statute serves the purpose of providing a moment "for quiet and private contemplation or introspection" which serves the "solely secular ends" of "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). The New Jersey statute by its terms simply provides a moment, at the outset of the school day, for uninterrupted reflection and quiet solitude; there is nothing inherently religious or coercive about this practice. One of the many benefits of such a moment of reflection is that it serves the pedagogical function of providing a "boundary" between school and non-school activities. However, even if the moment of silence served no pedagogical purpose, the New Jersey Legislature certainly was entitled to conclude that the secular benefits (to individual students and teachers) outweighed the costs and inconvenience of a moment of silence. The fact that the courts below disagreed with this legislative judgment [11] simply is irrelevant to a proper constitutional analysis.

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tivity would inevitably lead to [the statute's] invalidation under the Establishment Clause." *Lynch*, 104 S. Ct. at 1362; see *Wallace* v. *Jaffree*, 105 S. Ct. at 2494 (Powell, J., concurring).

[11] The district court's rejection of the statute's legitimate pedagogical purpose, which was upheld by the court of appeals, "relied heavily on evidence [*i.e.*, expert testimony] suggesting that the silent minute has no legitimate pedagogical value." J.S. App. 27a. Not only did the courts below "second guess" the educational value (and facially neutral purpose) of the statute, the district court expressed skepticism over the fact that the legislature did not retain an expert to testify concerning the pedagogical value of the moment of silence until after this litigation was initiated. J.S. App. 83a. The court's challenge to the New Jersey legislature's judgment as to the value of this statute—and the suggestion that a state legislature must develop evidence to support its legislative judgment—is completely unprecedented.

The second discernible legitimate purpose of the moment of silence statute was recognized by the court below: to accommodate those students who would use the moment of silence to engage in prayer. See *Jaffree*, 105 S. Ct. at 2498-2499 (O'Connor, J., concurring); *id.* at 2493, n.2 (Powell, J., concurring); *id.* at 2508 (White, J., dissenting). The Court has long recognized that a state legislature may act to "accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of Presiding Bishop* v. *Amos*, 107 S. Ct. 2862, 2867 (1987); see *Zorach* v. *Clauson*, 343 U.S. 306 (1952); see also *Hobbie* v. *Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1051 (1987). "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 107 S. Ct. at 2867 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)). Thus, a desire to accommodate individual students by providing them with a moment for voluntary silent prayer is a permissible purpose under the Establishment Clause.

Appellees argue that this statute cannot be upheld as a permissible accommodation for several reasons. First, Appellees argue that the purpose of accommodating school children was never raised or considered by the parties or courts below. Appellees' Br. 34. Appellees are incorrect. According to the court of appeals, the district court concluded that the legislative purpose in enacting the moment of silence statute was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day." J.S. App. 27a-28a. Moreover, the court of appeals held that a finding that the purpose of the statute was "to encourage prayer" rather than "to accommodate those wishing to pray" could not be sustained. *Id.* at 28a-29a. In view of this clear finding by the court of appeals that the purpose

of the statute was to accommodate religious beliefs, the court of appeals' conclusion that the statute lacked a "secular purpose" was erroneous.[12]

Second, Appellees argue that an "accommodation purpose" is impermissible if government intervenes *only* "to facilitate a religious practice"—rather than to "eliminate some obstacle to free exercise" or assure "even handed treatment to religion." Appellees' Br. 34-35. However, this Court has long made clear that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Thus, Appellants need not show that the accommodation is "necessary" in any sense; see *Zorach* v. *Clausen*, 343 U.S. at 314; see also Br. of United States as *Amicus Curiae*, 22-23. Instead, the state legislature is free to "facilitate the opportunities of individuals to practice their religion" so long as the means chosen do not advocate or promote a religious practice. *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *Lynch* v. *Donnelly*, 104 S. Ct. at 1364-1365.[13] New Jer-

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[12] The court of appeals concluded that "[a] purpose of accommodating the religious beliefs of some students is itself a religious purpose." J.S. App. 28a. But this Court has never held that a purpose to accommodate religious practices is impermissible. In fact, the law is to the contrary. See *Amos*, 107 S. Ct. at 2868-2869; *Gillette* v. *United States*, 401 U.S. 437, 453-54 (1971).

[13] Even in cases that do not involve accommodation, this Court has never required the government to demonstrate that the challenged action is "necessary" to achieve the government interest at issue, as it would if a heightened standard of review—rather than a rationality standard—were applicable. For example, in *Lynch* v. *Donnelly*, this Court held that the fact that the "City's objectives could have been achieved without including the creche in the [City's Christmas] display" was "irrelevant" to the Establishment Clause analysis. 104 S. Ct. at 1363 n.7.

If, in fact, it were necessary to prove that the accommodation in question "lift[s] a government-imposed burden," *cf. Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring), Appellants could never-

sey's statute is facially neutral and therefore permissible under that standard.

Finally, Appellees argue that the moment of silence is an impermissible accommodation because it does not accommodate *all* religious interests, specifically the interests of those "whose prayers require action and/or sound." Appellees' Br. 38. But, this Court has never held that efforts at accommodating religion must achieve the virtually impossible task of simultaneously accommodating every conceivable religious belief. Instead, this Court has only required that legislative action be free of hostility towards all faiths. *Lynch*, 104 S. Ct. at 1364-1365; *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Because the moment of silence law is religiously neutral and non-coercive, it is an acceptable means of religious accommodation. Moreover, as the court of appeals correctly noted, it is the compulsory attendance law, not the moment of silence statute, that inhibits the religious practices of those "whose prayer must be oral or otherwise self expressive." J.S. App. 19a.[14]

3. Appellees suggest that, even if the moment of silence law has a permissible purpose, it must be struck

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theless make such a showing. Although it may be "possible"—in the strictest sense—to pray during lunch, in the playground or in the classroom, the potential for distraction or embarrassment is substantial. Aside from the statute at issue, there is at present no requirement that any time be set aside in the school day for contemplative activity. Thus, the moment of silence alleviates a situation where the state itself, through compulsory attendance laws, has created a regimented environment that burdens religious exercise. See *Marsh*, 463 U.S. a 812 (Brennan, J., dissenting).

[14] If there are religious groups or individuals in the New Jersey public school system who do not recognize silent prayer as at least one acceptable form of prayer, the Appellees have not identified them. It is in fact likely that the issue raised is purely hypothetical because all major religious faiths recognize silent prayer as an acceptable form of prayer. See C. Whittier, *Silent Prayer and Meditation in World Religions* 7 (Cong. Research Service 1982).

down because it has the "direct and immediate effect of advancing religion." Appellees' Br. 28. However, there is no evidence that, under the standards set forth by this Court, the moment of silence has an impermissible effect.

The moment of silence law is neutral among religions. See *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). A moment of silence is not coercive; it does not force any individual student to compromise his beliefs. See *Jaffree*, 105 S. Ct. at 2491-2493. In addition, a moment of silence does not convey a message of government endorsement or approval of religion. *Jaffree*, 105 S. Ct. at 2498-2499 (O'Connor, J., concurring); *id.* at 2493, n.2 (Powell, J., concurring); see *Lynch*, 104 S. Ct. at 1369-1370.[15] "By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the silent period." *Jaffree*, 105 S. Ct. at 2499 (O'Connor, J., concurring). The court of appeals thus correctly concluded that the moment of silence statute at issue here has no impermissible effects. J.S. App. 22a.

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[15] Appellees argue that some teachers "would likely use" the moment of silence to pray and that the "public perception" of the statute might cause "some children [to] pray because of the perceived message from . . . the moment of silence exercise." Appellees' Br. 29-33. But the statute, on its face, is neutral in operation and there is nothing—other than Appellees' speculation—to suggest that a simple moment of silence would have any impermissible effect. See *Jaffree*, 105 S. Ct. at 2498-2499 (O'Connor, J,. concurring); *id.* at 2495 n.9 (Powell, J., concurring). If Appellees were concerned about how the moment of silence statute would operate in practice, they should have waited and challenged the statute as-applied. Any problems that might derive from the misuse (or misunderstanding) of the New Jersey moment of silence statute properly should be addressed at the time, and in the particular factual setting, in which they arise.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1986

ALAN J. KARCHER, ET AL., APPELLANTS

v.

JEFFREY MAY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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38 pp

QUESTIONS PRESENTED

1. Whether appellants have standing to invoke this Court's appellate jurisdiction.

2. Whether a state statute that provides for a moment of silence in public school classrooms "to be used solely at the discretion of the individual student * * * for quiet and private contemplation or introspection" (N.J. Stat. Ann. § 18A:36-4 (West. Supp. 1986)) violates the Establishment Clause of the First Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. Appellants lack standing to maintain this appeal	8
II. The New Jersey statute does not violate the Establishment Clause	14
A. The New Jersey statute has a valid primary purpose	14
B. The statute does not have the impermissible effect of advancing or inhibiting religion, or of creating an entanglement between church and state	28
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963)	14, 16, 22, 30
Ansonia Board of Education v. *Philbrook*, No. 85-495 (Nov. 17, 1986)	2
Bender v. *Williamsport Area School Dist.*, No. 84-773 (Mar. 25, 1986)	9, 11, 12, 13
Bose Corp. v. *Consumers Union*, 466 U.S. 485 (1984)	6, 23
Bowen v. *Roy*, No. 84-780 (June 11, 1986)	2, 19
Brandon v. *Holt*, 469 U.S. 464 (1985)	10
Burke v. *Barnes*, No. 85-781 (Jan. 14, 1987)	13
Coleman v. *Miller*, 307 U.S. 433 (1939)	13
Davis v. *Preston*, 280 U.S. 406 (1930)	11
Diamond v. *Charles*, No. 84-1379 (Apr. 30, 1986)	9, 11, 12, 13

Cases—Continued: Page

Engel v. *Vitale*, 370 U.S. 421 (1962) 30
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 26
Estate of Thorton v. *Caldor, Inc.*, 472 U.S. 703 (1985) 2
Everson v. *Board of Education*, 330 U.S. 1 (1947) .. 25
Field v. *Clark*, 143 U.S. 649 (1892) 12
Gillette v. *United States*, 401 U.S. 437 (1971) 19, 20, 28
Goldman v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) 2
Goldwater v. *Carter*, 444 U.S. 996 (1979) 13
Hobbie v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987) 2, 19
Hunter v. *Underwood*, 471 U.S. 222 (1985) 26
Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948) 21
Kentucky v. *Graham*, 473 U.S. 159 (1985) 10
Larson v. *Valente*, 456 U.S. 228 (1982) 28
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) ..2, 3, 4, 8, 14, 30
Lynch v. *Donnelly*, 465 U.S. 668 (1984) 2, 15, 18, 19, 28
Marsh v. *Chambers*, 463 U.S. 783 (1983) 2, 19, 20, 30
McDaniel v. *Paty*, 435 U.S. 618 (1978) 19
McGowan v. *Maryland*, 366 U.S. 420 (1961) 17, 20, 25
McRae v. *Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976), rev'd, 448 U.S. 297 (1980) 13
Miller v. *Fenton*, No. 84-5786 (Dec. 3, 1985) 23
Monell v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978) 9
Mueller v. *Allen*, 463 U.S. 388 (1983) 16, 20, 22
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979) 20
Princeton University v. *Schmid*, 455 U.S. 100 (1982) 9
Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 2
St. Martin Evangelical Lutheran Church v. *South Dakota*, 451 U.S. 772 (1981) 2, 20, 22
School District v. *Ball*, 473 U.S. 373 (1985) 2, 29
Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) 27
Sherbert v. *Verner*, 374 U.S. 398 (1963) 19
Sloan v. *Lemon*, 413 U.S. 825 (1973) 2
Stone v. *Graham*, 449 U.S. 339 (1980) 25

Cases—Continued: Page

Thomas v. *Review Board*, 450 U.S. 707 (1981) 19
Tilton v. *Richardson*, 403 U.S. 672 (1971) 2
TWA v. *Hardison*, 432 U.S. 63 (1977) 2, 19
United States v. *Ballin*, 144 U.S. 1 (1892) 12
United States v. *Lee*, 455 U.S. 252 (1982) 2, 22
United States v. *O'Brien*, 391 U.S. 367 (1968) 25
United States v. *Seeger*, 380 U.S. 163 (1965) 16
Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) 8-9
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 26
Wallace v. *Jaffree*, 472 U.S. 38 (1985) ..... *passim*
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 19, 20
Widmar v. *Vincent*, 454 U.S. 263 (1981) 29
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 19
Witters v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 27, 1986) 2, 19
Zorach v. *Clauson*, 343 U.S. 306 (1952) 17, 18, 20, 21, 22, 28, 30

Constitutions, statutes and rules:

U.S. Const.:
Amend. I:
(Establishment Clause) 1, 3, 14, 23, 27
(Free Exercise Clause) 19, 22, 24
Art. III 8, 9, 11-12, 13
N.J. Const.:
Art. 4, § 1 11
10 U.S.C. 7204 1
20 U.S.C. 241 1
20 U.S.C. 926 1
22 U.S.C. 2701 1
25 U.S.C. 271-304b 1
28 U.S.C. 2403 11
42 U.S.C. 1983 2
N.J. Stat. Ann. (West Supp. 1986):
§ 2A:1-10 12
§ 18A:36-4 ..... 2, 8

Statutes and rules—Continued: Page

§ 52:17A-4 11
§§ 52:17B-2 to 17B-5 11

Fed. R. App. P. 43(c)(1) 8, 10
Fed. R. Civ. P.:

25(d)(1) 10
52(a) 6

Sup. Ct. R.:

28.4(b) 11
28.4(c) 11
40.3 10

Miscellaneous:

S. Bok, *Secrets* (1982) 15
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, ET AL., APPELLANTS

v.

JEFFREY MAY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case concerns the constitutionality, under the Establishment Clause of the First Amendment, of a New Jersey statute that authorizes a moment of silence in public schools to enable students to engage in private contemplation or introspection. The United States is authorized to operate schools for military and foreign service dependents under certain circumstances. See 10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Department of Defense); 22 U.S.C. 2701 (foreign service); 25 U.S.C. 271-304b (schools for Indians). The resolution of this case will bear on Congress's authority to allow periods for voluntary silent prayer or meditation in such schools. The United States also has a more general interest in the extent to which the Constitution permits government to adopt neutral and noncoercive accommodations to private religious practices.[1]

[1] The United States has participated as a party or as *amicus curiae* in numerous cases arising under the Religion Clauses of the First Amendment. See, *e.g.*, briefs filed by the United States in *Corporation of the Presiding Bishop of The Church of Jesus Christ*

STATEMENT

1. In December 1982, the New Jersey legislature enacted a statute providing for a moment of silence at the opening of the day in each of the State's public schools. The statute (N.J. Stat. Ann. § 18A:36-4 (West Supp. 1986)) states:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

The statute became effective on December 17, 1982 (J.S. App. 4a, 65a).

On January 10, 1983, appellees—a New Jersey public school teacher, several public school students, and parents of public school students—commenced this action under 42 U.S.C. 1983 in the United States District Court for the District of New Jersey, alleging that the statute is unconstitutional on its face and as applied, and seeking an injunction against its implementation. The complaint named as defendants the State Commissioner of Education, the Edison Township Board of Education,

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of Latter Day Saints v. *Amos*, No. 86-179 (argued Mar. 31, 1987); *Hobbie v. Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987); *Ansonia Board of Education* v. *Philbrook*, No. 85-495 (Nov. 17, 1986); *Bowen* v. *Roy*, No. 84-780 (June 11, 1986); *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986); *Witters* v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 27, 1986); *School District* v. *Ball*, 473 U.S. 373 (1985); *Estate of Thorton* v. *Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983); *United States* v. *Lee*, 455 U.S. 252 (1982); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

and the Old Bridge Township Board of Education. J.S. App. 4a, 65a.

On January 18, 1983, the district court allowed intervention as defendants by "Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, Carmen A. Orechio in his representative capacity as President of the New Jersey Senate and the New Jersey Senate" (Mot. to Dis. App. 22a). The original defendants took no active role in defending the statute; "the intervening defendants vigorously contested the action both during pretrial discovery proceedings, and at the trial itself." J.S. App. 66a; see also *id.* at 6a.

Following trial, the district court entered a declaratory judgment stating that the New Jersey statute violated the Establishment Clause of the First Amendment (J.S. App. 62a-102a). It concluded from the evidence adduced at trial (*id.* at 66a-85a) that the purpose of the statute "was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer" (*id.* at 86a). It found that the statute was promoted by persons favoring an opportunity for prayer in school, and that the statute was opposed by those who perceived the moment of silence as "an enforced religious observance" (*id.* at 87a). The court rejected the contention that the statute's purpose was "to provide a transition from non-school life to school work" (*ibid.*).

Applying the test set forth by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the district court stated that a statute is valid under the Establishment Clause if it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion (J.S. App. 89a-90a). Looking to the actions of prior New Jersey legislatures in attempting to "reintroduce a mandatory time for prayer in the public schools; the debate upon the [statute] which was in terms of public prayer and State involvement in religion; [and] the time and manner in which the minute of silence was mandated, following the form and posture of school

prayer which was outlawed in the early 1960's" (*id.* at 90a), the court found that the statute had a religious purpose.

The court also concluded that the statute "both advances and inhibits religion" (J.S. App. 94a). Religion would be inhibited, according to the district court, because some persons believe that "mandated prayer is no longer prayer," but is "drained of its substance, loses its power and becomes but an empty shell" (*id.* at 95a). In addition, those whose prayers "require movement and sound" would be prevented from engaging in their form of prayer (*id.* at 96a). Finally, the court stated that the statute requires persons "who profess no religion" to "assume a posture suggestive of particular forms of prayer" or "face public opprobrium or ridicule by asking to be excused each day" (*id.* at 97a).

The district court also concluded that the statute "fosters an excessive government entanglement with religion" (J.S. App. 98a). It found that the statute "would not involve the State in the kind of continued and pervasive monitoring of sectarian activities" condemned by this Court in *Lemon* v. *Kurtzman*, *supra*, but that the statute would "tend to promote divisiveness among and between religious groups, another form of entanglement" (J.S. App. 98a).[2]

2. The court of appeals affirmed by a divided vote (J.S. App. 1a-61a). It rejected the district court's construction of the statute as "direct[ing] that all pupils be required to engage in a silent moment" (*id.* at 9a (footnote omitted)), holding that such participation is "permissive only" (*id.* at 15a), and that students need only "refrain from interrupting the observance" (see *id.* at 21a-22a). The court of appeals also rejected the district court's conclusion that the statute would foster an excessive entanglement between government and religion by promoting divisiveness among religious groups. Ob-

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[2] The district court declared the statute unconstitutional on its face and as applied, but entered no injunctive relief (J.S. App. 101a-102a).

serving that "any accommodation made by government to the free exercise of religion by believers is politically divisive in the sense that it offends those who believe that such accommodation is an unwarranted toleration," the court concluded that political divisiveness is not the test for finding an impermissible entanglement between government and religion (J.S. App. 17a). If the possibility of divisiveness alone were sufficient, the court noted, "no governmental accommodation of religion would survive establishment clause scrutiny" (*ibid.*).

The court of appeals next held that the statute did not have the effect of advancing or inhibiting religion. It found irrelevant the district court's observation that the statute does not accommodate the religious beliefs of persons whose prayer must be oral or otherwise self-expressive, noting that "[i]t is * * * the compulsory school attendance law, not N.J.S.A. 18A:36-4, that 'prevents other persons from engaging in their kind of prayer'" (J.S. App. 19a). The court held that the restriction upon the oral or self-expressive activities of students not wishing to participate was "valid as a legitimate time, place, and manner regulation" (*id.* at 22a).[3] It found that the state had not improperly advanced religion by setting aside a specific time for permissive silent prayer: "if accommodation to the preference of those who wish to pray silently is to be made at all, the state must be free to designate when, during the school day, such accommodation shall take place" (*ibid.*).

Finally, the court of appeals considered whether the legislature acted with a permissible purpose when it enacted the moment of silence statute. Analyzing this Court's decision in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), the court of appeals concluded that "in the abstract a statute such as N.J.S.A. 18A:36-4 would not * * * be deemed invalid under the purpose leg of *Lemon*

[3] The court stated that requiring other pupils to remain seated might not be "the only possible accommodation to the views of nonparticipants. * * * In some districts it may be possible that nonparticipating pupils leave the classroom during the exercise" (J.S. App. 22a).

v. *Kurtzman*" (J.S. App. 26a). It noted, however, that the district court had found that the legislature acted with a religious purpose. Applying the clearly erroneous standard to that finding (see Fed. R. Civ. P. 52(a)), the court of appeals upheld the district court's rejection of "the legislators' tendered secular purpose—to provide a transition from nonschool to school life" (J.S. App. 27a). It therefore "accept[ed]" the district court's finding that the legislature's purpose was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day" (*id.* at 27a-28a). It emphasized that "a finding that the religious purpose was to encourage prayer over other alternatives, rather than to accommodate those wishing to pray would [not] be sustainable" (*id.* at 29a).

The court concluded that the question before it was whether the state may "take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray" (J.S. App. 29a). Stating that this Court has required a "secular purpose" to sustain statutes against an Establishment Clause challenge and that the district court had found no such purpose underlying the New Jersey statute, the court of appeals declared the statute to be unconstitutional (*id.* at 29a-30a).

Judge Becker dissented (J.S. App. 31a-60a). He stated that "a permissive, facially neutral statute such as the New Jersey moment of silence law, which has no impermissible effects and fosters an [*sic*] impermissible entanglement, carries with it a strong presumption of constitutionality which only the clearest proof of an absence of secular purpose can vitiate" (*id.* at 43a). Relying upon this Court's decision in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), Judge Becker concluded that the district court's finding of a religious purpose was subject to plenary review (J.S. App. 43a-47a).

Judge Becker carefully analyzed the evidence in the record and concluded that the evidence was not sufficient,

"separately or cumulatively, to prove an absence of any secular purpose behind the statute." He found the evidence equivocal at best, and noted that "the single unambiguous piece of evidence—the face of the statute itself—attests to the secular motives of the legislators," and in that regard was supported by parts of the testimony of the witnesses who attended the legislative hearings (J.S. App. 58a).[4]

3. The court of appeals' judgment was entered on December 24, 1985 (J.S. App. 104a-105a). On January 14, 1986, appellant Karcher was replaced as Speaker of the New Jersey General Assembly by Charles Hardwick; appellant Orechio was replaced as President of the New Jersey Senate by John Russo on the same date (Mot. to Dis. ii). In March 1986, appellants filed a notice of appeal to this Court and a jurisdictional statement. One month later, the incumbent Speaker of the New Jersey General Assembly and President of the New Jersey Senate directed appellants' counsel to withdraw the appeal to this Court (Mot. to Dis. App. 4a-5a). Appellant Karcher responded to those directives by informing his counsel that "[t]he legislative action in question was the product of the 200th Legislature and specifically was a bill which had the General Assembly as its house of origin. The 200th Legislature has an independent legal existence separate and apart from the 202nd Legislature and it is in fact that legislative body which is your client" (*id.* at 6a).

SUMMARY OF ARGUMENT

I. This appeal should be dismissed for want of jurisdiction because appellant Alan J. Karcher—the only appellant pursuing this appeal—lacks standing to invoke this Court's appellate jurisdiction. Karcher intervened in this case in his official capacity as Speaker of the New Jersey General Assembly. Shortly after the court of appeals rendered its decision in this case, Karcher was re-

[4] Judge Becker further stated that even under a deferential standard of review he would overturn the district court's conclusion that the statute lacked a secular purpose (J.S. App. 58a-60a).

placed as Speaker by Charles Hardwick; by operation of Rule 43(c)(1) of the Federal Rules of Appellate Procedure, Hardwick was "automatically substituted as a party" for Karcher. Hardwick has requested that the appeal to this Court be withdrawn. Because Karcher is no longer a party to this case, he has no standing to pursue the appeal.

II. If the Court reaches the merits, it should hold that the New Jersey statute does not violate the Establishment Clause. The statute is plainly supported by an appropriate legislative purpose under this Court's decision in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The statute simply permits a minute of silence for "quiet and private contemplation or introspection" (N.J. Stat. Ann. § 18A:36-4 (West Supp. 1986)). We find two permissible purposes based upon the language of the statute. First, the statute by its terms provides an opportunity for reflection before beginning the work of the day. Second, the statute serves the additional purpose of accommodating the religious needs of students by providing an opportunity for silent prayer. A majority of the Court indicated in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), that a moment of silence statute could be upheld against an Establishment Clause challenge, and the New Jersey statute satisfies the standard set forth in that decision.

ARGUMENT

I. APPELLANTS LACK STANDING TO MAINTAIN THIS APPEAL

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." In order to ensure the presence of a case or controversy, Article III requires, "at an irreducible minimum, [that] the party who invokes the court's authority * * * 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College* v. *Americans United for*

Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); see also *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 6-7; *Bender* v. *Williamsport Area School Dist.*, No. 84-773 (Mar. 25, 1986), slip op. 6-8.

This Court has made clear that a party seeking to invoke a federal court's appellate jurisdiction, no less than a plaintiff seeking to invoke the jurisdiction of a federal district court, must satisfy this standing requirement imposed by Article III. See *Diamond* v. *Charles*, *supra*; *Bender* v. *Williamsport Area School Dist.*, *supra*. In our view, appellant Karcher lacks standing to invoke this Court's appellate jurisdiction, and the appeal should therefore be dismissed for want of jurisdiction.[5]

1. An action against a government officer in his official capacity "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent" (*Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 690 n.55 (1978)). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally,

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[5] It appears from the documents filed in this Court that Karcher is the only appellant pursuing this appeal. The jurisdictional statement identifies four appellants: appellant Karcher, "the New Jersey General Assembly, Carmen A. Orechio, as President of the New Jersey Senate, and the New Jersey Senate" (J.S. ii). The incumbent Speaker of the General Assembly and President of the Senate have disavowed any interest in pursuing an appeal in this Court (Mot. to Dis. App. 4a-5a). Because the legislative bodies' interest in intervening in this action was presented through the representations of the prior Speaker and President, who asserted a right to represent the legislative bodies' views in litigation (see *id.* at 15a), these new representations appear to be sufficient to withdraw the General Assembly and the Senate as appellants before this Court. Appellant Orechio has not indicated any interest in pursuing the appeal before this Court over the objection of the current President of the Senate. Cf. *Princeton University* v. *Schmid*, 455 U.S. 100 (1982). In any event, his status is indistinguishable from that of appellant Karcher and he therefore lacks standing for the reasons discussed in the text below.

for the real party in interest is the entity." *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985) (emphasis in original; citation omitted); see also *Brandon* v. *Holt*, 469 U.S. 464, 471-473 (1985).

The district court permitted appellant Karcher to intervene as a defendant in this action "in his representative capacity as Speaker of the New Jersey General Assembly" (Mot. to Dis. App. 22a). The colloquy at the hearing at which the intervention motion was granted makes clear that Karcher intervened not as an individual, but solely in his official capacity as Speaker in order to represent the General Assembly (*id.* at 15a, 16a, 21a).[6] Because he intervened in this action as Speaker of the New Jersey General Assembly, and he no longer holds that office, Karcher is no longer a party to this litigation.

Rule 43(c)(1) of the Federal Rules of Appellate Procedure states that "[w]hen a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, * * * [his] successor is automatically substituted as a party. * * * An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution." The Rules of this Court and the Federal Rules of Civil Procedure each contain an essentially identical provision. See Sup. Ct. R. 40.3; Fed. R. Civ. P. 25(d)(1). On January 14, 1986, Charles Hardwick replaced Karcher as Speaker of the General Assembly; by operation of this rule of procedure Speaker Hardwick automatically was substituted for Karcher as the official-capacity party in this litigation. See *Kentucky* v. *Graham*, 473 U.S. at 166 n.11; *Brandon* v. *Holt*, 469 U.S. at 470-471. Karcher is not now a party to this action and,

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[6] The fact that Karcher was not named as an original defendant in the complaint, but intervened as a defendant little more than a week after the complaint was filed, does not alter the fact that he appeared in the action solely in his official capacity as Speaker of the New Jersey General Assembly.

therefore, has no status that would entitle him to invoke the appellate jurisdiction of this Court. Cf. *Davis* v. *Preston*, 280 U.S. 406, 407 (1930) (citation omitted) (where a state supreme court had entered judgment against a federal officer in his official capacity, and the federal officer had been replaced by a successor, the former officer "was not then in a position to complain of the judgment or to invoke a review of it by this Court. All right and discretion to do either had passed to his successor in office").[7]

2. Karcher may assert that he has standing to appeal in his capacity as an individual state legislator. As a threshold matter, Karcher intervened in this action in his official capacity as Speaker of the New Jersey General Assembly in order to represent the General Assembly as a whole; he did not intervene as an individual legislator (see Mot. to Dis. App. 14a-16a, 22a). He may not participate in these proceedings in the latter capacity without first filing "an appropriate motion or pleading setting forth the claim or defense that he desires to assert" (*Bender* v. *Williamsport Area School Dist.*, slip op. 13 (footnote omitted)). Even if Karcher were properly before this Court in his capacity as an individual state legislator, moreover, he would have no standing to pursue this appeal.

In *Diamond* v. *Charles*, *supra*, the Court observed that "a State has standing to defend the constitutionality of its statute" (slip op. 7). A state generally asserts this interest through the actions of its Attorney General. See 28 U.S.C. 2403; Sup. Ct. R. 28.4(b), (c); N.J. Stat. Ann. §§ 52:17A-4, 52:17B-2 to 17B-5 (West Supp. 1986). Subject to any constraints imposed by Article

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[7] Karcher appears to assert (Mot. to Dis. App. 6a-7a) that he remains a party to this litigation as a representative of the 200th New Jersey Legislature, the body that enacted the moment of silence law. But that legislative body expired in January 1984 (see N.J. Const. Art. 4, § 1, para. 3). Karcher cannot represent an entity that no longer exists.

III and state law, a state may confer this interest upon other government officials or otherwise provide for its assertion in a judicial proceeding. See, *e.g.*, N.J. Stat. Ann. § 2A: 1-10 (West Supp. 1986) (authorizing the state supreme court to "appoint counsel specially to represent any party or interest as may be deemed necessary" in an action involving the constitutionality of a statute providing for the expenditure of public funds by the state or a state instrumentality). We have not discovered any New Jersey statute conferring upon individual state legislators the right to assert the State's interest in defending the constitutionality of its statutes. In the absence of such a satutory right, Karcher cannot rely upon that interest to justify his invocation of this Court's jurisdiction.

Karcher may assert that he has standing because the decisions below invalidating the moment of silence statute "nullified" his vote in favor of the statute. To the extent such an interest is cognizable under Article III, we submit that it is an interest that may only be asserted by the New Jersey Legislature as a whole, acting through its authorized representatives. In *Diamond* v. *Charles*, *supra*, the Court observed that " 'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has [a] * * * 'direct stake' * * * in defending the standards embodied in that code" (slip op. 10 (citations omitted)). The power to enact a law belongs to the legislature as a whole, not to an individual legislator. Cf. *United States* v. *Ballin*, 144 U.S. 1, 7 (1892); *Field* v. *Clark*, 143 U.S. 649, 672 (1892). An individual legislator therefore has no judicially cognizable interest in defending the constitutionality of a statute. Cf. *Bender* v. *Williamsport Area School Dist.*, slip op. 9. This clear rule avoids enmeshing the judiciary in intrusive and essentially political inquiries into whether a particular member is faithfully advancing the consid-

ered views of the legislature. Cf. *Goldwater* v. *Carter*, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring).[8]

Finally, Karcher does not have standing to pursue this appeal in his personal capacity. He did not seek leave in the district court to intervene in that capacity and, in any event, nothing in the record indicates that he suffered any personal injury as a result of the decisions below. *Bender* v. *Williamsport Area School Dist.*, slip op. 12-13; see also *Diamond* v. *Charles*, slip op. 12. Because Karcher lacks standing to invoke this Court's appellate jurisdiction, the appeal should be dismissed for want of jurisdiction.[9]

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[8] *Coleman* v. *Miller*, 307 U.S. 433 (1939), is not to the contrary. The Court held in that case that 20 state senators who had voted against ratification of a constitutional amendment had standing to challenge the legality of a tie-breaking vote in favor of ratification that was cast by the lieutenant governor as presiding officer of the state senate. The Court reasoned that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes" (307 U.S. at 438). First, the votes of the 20 senators in *Coleman* were legally significant as a bloc, because they were sufficient to prevent ratification absent the contested vote cast by the lieutenant governor. Nothing in the record indicates that Karcher's vote in favor of the moment of silence law, standing alone, carried such significance. Second, *Coleman* dealt with standing to challenge alleged irregularities in the legislature's internal voting process, and did not address the issue of standing to defend the constitutionality of a properly enacted statute. An extension of the *Coleman* rationale to the present context would enable any legislator to intervene in any case concerning the validity or interpretation of a statute for which the legislator had voted. That broad conclusion is inconsistent with Article III. See *McRae* v. *Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), rev'd on other grounds, 448 U.S. 297 (1980).

[9] Because we conclude that Karcher has no standing to appeal to this Court, we do not address whether the two houses of the New Jersey legislature and their representatives had standing to appeal to the court of appeals. See *Bender* v. *Williamsport Area School Dist.*, *supra*. We note that the record does not appear to reflect whether the legislature's intervention was authorized by a resolution passed by the legislature. Cf. Pet. Br. at 27 n.20, *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987). (We have provided counsel with copies of this brief.)

II. THE NEW JERSEY STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

In *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), a majority of the Court indicated that a statute providing for a moment of silence at the beginning of the school day, to be used by each individual student as he or she sees fit, would not violate the Establishment Clause. 472 U.S. at 62-63 & n.2 (Powell, J., concurring); *id.* at 70-76 (O'Connor, J., concurring in the judgment); *id.* at 85-90 (Burger, C.J., dissenting); *id.* at 90-91 (White, J., dissenting); *id.* at 113-114 (Rehnquist, J., dissenting); see also *id.* at 59 (distinguishing "[t]he legislative intent to return prayer to the public schools" from "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday"); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring).

The Court in *Jaffree* (472 U.S. at 55-56) evaluated an Establishment Clause challenge to a moment of silence statute by applying the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" The New Jersey statute satisfies each of these requirements.

A. The New Jersey Statute Has A Valid Primary Purpose

We take as our starting point in ascertaining legislative purpose the words chosen by the legislature when it wrote the statute. On that basis we find two permissible purposes for the facially neutral New Jersey moment of silence law.[10]

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[10] We note that a statute is invalid under the purpose prong of the *Lemon* test only if it has *no* permissible purpose. See *Wallace* v. *Jaffree*, 472 U.S. at 56 (statute must be invalidated if "it is *entirely* motivated by purpose to advance religion") (footnote

1. The courts below were no doubt correct that the purpose of a "moment of silence" statute has something to do with prayer. And we shall argue that to the extent the statute is intended to accommodate some students' desire to pray, such accommodation of religion is, by this Court's teaching, a valid purpose (see pages 18-23, *infra*). But silence also gives an occasion for reflection upon what we are about and the larger purposes of our efforts. It is the condition for recollection and contemplation. It is a mark of seriousness and solemnity.[11] The New Jersey statute's requirement of a one-minute period of silence, without any suggestion that the time be used for prayer, by its terms provides this opportunity for unrestricted and uninterrupted reflection.[12]

Since the purpose of this legislation was, most obviously and most importantly, to institute by this facially neutral statute a period for "quiet and private contemplation or introspection," the legislation itself is the primary and best evidence of its purpose. Only the most unusual circumstances should suffice to move the analysis of purpose beyond that which plausibly appears from the words which the legislature chose, in a direction which contradicts the law's seemingly permissible objective. Such an approach is consistent with this Court's

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omitted; emphasis added); see also *id.* at 64 (Powell, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984).

[11] Plutarch, *Concerning Talkativeness*, in VI *Plutarch's Moralia* 407 (W.C. Helmbold trans. 1927); Montaigne, *Of Solitude*, in *The Complete Works of Montaigne* 177 (D. Frame trans. 1958); I H.D. Thoreau, *Journal* 64-65, 67 (B. Torrey ed. 1906); S. Bok, *Secrets* 42 (1982).

[12] One possible, specific contribution—though certainly not the only one—of a brief, silent interlude at the beginning of the school day, is to provide a "boundary" between school and non-school time, to emphasize the need for discipline and seriousness in the school context. While appellants asserted such a justification for the statute, the district court found that this was an "after-the-fact rationalization and not the real purpose of the [statute]" (J.S. App. 87a). We agree with Judge Becker that this finding must be overturned (*id.* at 56a-57a).

"reluctance to attribute unconstitutional motives to States, particularly when a plausible secular purpose for the State's program may be discovered from the face of the statute" (*Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983)).

Prayer plainly fits into this purpose to provide a moment for serious reflection and recollection. Indeed prayer is a special case, a focused variety of reflection and meditation. When religious persons look into themselves for a moment to consider what they are about to do and why, that reflection often takes the form of prayer; they share their quietest and most serious thoughts with the deity. Others may turn to different sources of duty or dedication. Cf. *United States* v. *Seeger*, 380 U.S. 163, 176 (1965). So when this Court begins its sessions with a spoken invocation, it might—to the same effect for some, but with broader meaning for others as well—begin with a moment of silence, in which we all reflect on our relation to the serious work about to begin. The several legislatures enacting moment of silence statutes like the present one have quite obviously considered it appropriate to preface the business of learning with such a brief retreat into quiet and reflection. For this reason we think this and other statutes like it are at their core quite properly general, secular and therefore unobjectionable.[13]

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[13] Insofar as it embodies an accommodation of religious differences, the moment of silence also serves the wholesome purpose of "fostering harmony and tolerance among the pupils" (*Abington School Dist.* v. *Schempp*, 374 U.S. at 280 (Brennan, J., concurring)). Ours is a nation of great religious diversity. Schoolchildren may reveal their religious background—or lack of it—in the clothing they wear, the food they eat, or the words they utter; religious differences are not likely to be overlooked. Harmony requires, therefore, that we develop habits of mutual respect and toleration for the religious practices of others. The moment of silence provides an opportunity for young people to learn that each individual is free to worship and believe (or not believe) according to the dictates of his own conscience, and that the religious practices of others do not threaten or interfere with their own. The moment of silence is uniquely suited to such a lesson in toleration because of

Hesitation in accepting this conclusion may derive from two sources. First, prayer is often a formalized, traditional and in some communities the dominant form which reflection and meditation take. To the extent that "we are a religious people" (*Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)), this is hardly surprising. Second, the historical origin of a desire to have such a moment of silence is undoubtedly religious in inspiration. That too, given our history, is not surprising. It is instead one of many examples in which purposes and values, religious in their origin, have become generalized beyond those particularistic origins to serve the pluralistic and secular society we have become. As Justice Frankfurter observed in *McGowan* v. *Maryland*, 366 U.S. 420, 477 (1961) (footnotes omitted) (concurring opinion):

> whatever the nature of the propulsions underlying state-enforced Sunday labor stoppage during the[] centuries before the twentieth, it is clear that its effect was the creation of an institution of Sunday as a day apart. The origins of the institution were religious, certainly, but through long-established usage it had become a part of the life of the English people. It was a day of rest not merely in a physical, hygienic sense, but in the sense of a recurrent time in the cycle of human activity when the rhythms of existence changed, a day of particular associations which came to have their own autonomous value for life.

Thus, it surely is not a vice of moment of silence statutes that their origin may be rooted in religion, or that some, perhaps many, will put the occasion offered to specifically religious purposes.

It is in this larger, more common-sense context that the New Jersey statute's purpose and effect of accommodating religion must be placed. Moment-of-silence statutes do accommodate the desire of some students to dedicate themselves to God at the beginning of the school day

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its dual nature—as an opportunity for exercise of faith among those who believe, and a wholly secular occasion for those who do not.

as at the commencement of any serious enterprise. Silence is a fostering condition for prayer, and other occasions for it—in the hallway or cafeteria—may not be as good. And, of course, this Court has made clear that accommodation, even if it stands as a sole purpose and effect of legislation, is not for that reason deprived of the designation of secular legislation. See pages 18-23, *infra*.

But the purpose to accommodate does *not* stand alone in this legislation, any more than that purpose stands alone in statutes exempting from taxation nonprofit educational, cultural and religious institutions. The generalized purpose of such statutes is to assist institutions which foster the culture and values of the people, a project in which churches at periods in history have often played a dominant, perhaps a unique role. From the churches' point of view, as from the point of view of some legislators, such statutes are certainly an accommodation, but this should not preclude seeing them in their larger, generalized context. Thus, though we believe this statute is valid as an accommodation of religion pure and simple, as the religious exemption at issue in *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter Day Saints* v. *Amos*, No. 86-179, is an accommodation of religion pure and simple, we suggest also that the Court not look at this statute just as accommodation pure and simple, but also in terms of the larger purpose and effect apparent from its language.

2. Even if the statute is viewed solely as an accommodation of students who wish to engage in silent, voluntary prayer, that purpose does not violate the Establishment Clause. This Court has recognized that our national traditions encourage government to act in a manner that enhances an individual's ability to observe his faith. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 677-678 (1984) (citations omitted); *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 14-24. It has observed that

"the Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. at 673; see also *Wallace* v. *Jaffree*, 472 U.S. at 81-83 (O'Connor, J., concurring in the judgment); *Thomas* v. *Review Board*, 450 U.S. 707, 726-727 (1981) (Rehnquist, J., dissenting). "[T]he interrelationship of the Religion Clauses has permitted government to take religion into account * * * to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel* v. *Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring) (footnotes omitted).

Applying this principle, the Court repeatedly has approved actions by government to ease burdens on voluntary religious observance caused by facially neutral governmental policies and practices.[14] While it serves the

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[14] Some accommodations of religion are compelled by the Free Exercise Clause. See, *e.g.*, *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). But the Court has made clear that government's authority to accommodate religion is not limited to the measures required by the Free Exercise Clause: "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970); see also *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 & n.19 (opinion of Burger, C.J.); *Wallace* v. *Jaffree*, 472 U.S. at 82 (O'Connor, J., concurring in the judgment); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *TWA* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting); *Gillette* v. *United States*, 401 U.S. 437, 453 (1971).

The Court has approved a variety of measures designed to enhance individuals' ability to conduct themselves in accordance with their religious beliefs without first finding such measures to be compelled by the Free Exercise Clause. See, *e.g.*, *Witters* v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 26, 1986) (extension of aid under state vocational rehabilitation program to finance petitioner's theological training); *Lynch* v. *Donnelly*, *supra* (inclusion of creche in municipal Christmas display); *Marsh* v. *Chambers*,

broader purpose discussed above, a moment of silence is also an example of such a permissible accommodation of religion. Through it the State—without itself sponsoring or endorsing religion—provides an opportunity for purely voluntary private devotion in the context of a structured, compulsory state institution in which such opportunities would otherwise be nonexistent or extremely limited.[15]

The constitutionality of a statute providing for a moment of silence is most powerfully supported by this Court's holding in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). There, the Court upheld a released time program that allowed students, with the permission of their parents, to leave the school grounds and go to religious centers for religious instruction. It observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" (343 U.S. at 313-314). The Court reasoned (*id.* at 313) that there are many circumstances in which public school students need special provision to enable them to exercise their religion. Ex-

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supra (opening of legislative sessions with prayer); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from unemployment taxes); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from the National Labor Relations Act); *Gillette* v. *United States*, 401 U.S. 437 (1971) (exemption of religious observers from compulsory military service); *Walz* v. *Tax Comm'n*, *supra* (property tax exemptions for religious organizations); *McGowan* v. *Maryland*, 366 U.S. 420 (1961) (Sunday closing laws); *Zorach* v. *Clauson*, *supra* (off-premises public school release time programs).

[15] It is particularly appropriate for the state to provide an opportunity for voluntary religious exercise in circumstances such as military service, prisons, or compulsory schooling, where the state has itself created a regimented environment that might—in the absence of governmental accommodation—tend to inhibit religious exercise. See *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting).

amples given were Roman Catholic mass during school hours on a Holy Day of Obligation, Jewish observances on Yom Kippur, and Protestant attendance at a family baptismal ceremony. The need for regular religious instruction and devotion, the Court found, is not different. Whether religious accommodation is made "occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act" (*ibid.*).

A moment of silence is an equally appropriate response to the religious needs of many students.[16] By providing a brief opportunity for contemplative activity at the beginning of the school day, the government merely creates an opportunity that the students may use, if they wish, for prayer—or for meditation or other quiet contemplation if they prefer. Nothing is asked of a student who wishes not to pray or meditate but that he remain silent, respecting the rights of his fellow students whose views may be different. In general, others need not even know what a person chooses to do. Even more clearly than was true in *Zorach*, then, the moment of silence puts religion on a wholly voluntary basis. It simply expands the freedom available to individuals to decide for themselves whether and how to engage in religious practice, without inducing or coercing that choice.

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[16] It might be argued that the moment of silence is more like the on-premises released time program invalidated in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), than the off-premises program approved in *Zorach*, simply because the opportunity for religious practice here takes place physically on the public school premises. However, the constitutional flaw in the *McCollum* program was that "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction" (*Zorach*, 343 U.S. at 315). Since the moment of silence is not in and of itself a religious activity (but only a moment of privacy in which a student may, if he chooses, engage in a religious activity), it does not create the concerns generated by the *McCollum* program. The classroom is not used for religious instruction or overt religious observance; thus the force of the school is in no way invoked to promote prayer.

It could be asserted that a statute providing for a moment of silence is not necessary to accommodate the religious needs of school children because, even in the absence of such a statute, a student may engage in silent prayer. While this may be true, it does not follow that the provision for a moment of silence does not "lift[] a government-imposed burden on the free exercise of religion" (*Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment)). Though it may be possible to meditate or pray during the hustle-bustle of lunch, or on the playground, or during a lull in classroom activity, surely all contemplative activity, including prayer, is enhanced if outside distractions are momentarily stilled. Many people may be dissuaded, by those distractions or by potential embarrassment, from undertaking to pray or meditate. If all are silent, then all are free to pray or meditate as they choose, without having to appear "different." Cf. *Abington School Dist.* v. *Schempp*, 374 U.S. at 208 n.3.

Moreover, necessity is not the standard. Most forms of religious accommodation are subject to the objection that they are "unnecessary." The students involved in *Zorach* could have found time in the evening or at dawn to engage in religious instruction, without benefit of the released time program. The employees of church-operated schools in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), could probably afford to pay unemployment taxes (cf. *United States* v. *Lee*, *supra*). There is no indication that parents in *Mueller* v. *Allen*, *supra*, could not send their children to religious schools without tax deductions. The need for a particular religious accommodation (where not required by the Free Exercise Clause) is primarily a question of public policy, for legislatures to assess. See *United States* v. *Lee*, 455 U.S. 252, 259-261 (1982); *Zorach* v. *Clauson*, 343 U.S. at 310, 314. Approximately half of the states have judged it appropriate to accommodate the religious needs of schoolchildren by providing an opportunity to pray during a formal moment of silence (see *Jaffree*, 472 U.S. at 70-71 & n.1 (O'Connor, J., con-

curring in the judgment)). Their reasons for doing so are substantial, and their action is consistent with the purpose of the Religion Clauses—to *facilitate* the free and voluntary exercise of religion, not to restrict it to an inhospitable and grudging minimum.[17]

3. Even accepting the factual findings of the courts below, the New Jersey statute would be found to have a permissible purpose. The court of appeals, reviewing the district court's finding of a "religious" purpose "to mandate a period * * * when all students would have an opportunity to engage in prayer" (J.S. App. 86a) under the clearly erroneous standard,[18] stated that it accepted the district court's finding that the legislature's purpose was religious "to the extent of requiring school districts to accommodate those students desiring the opportunity

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[17] At one point in its opinion in *Jaffree*, the Court stated that the moment of silence statute challenged in that case could not be justified as an accommodation of religion (see 472 U.S. at 57-58 n.45). That statement did not refer to moment of silence statutes generally, but to the peculiar characteristics of the statute at issue in *Jaffree*. As the Court noted, a previously-enacted Alabama statute protected "every student's right to engage in voluntary prayer during an appropriate moment of silence during the school-day" (*id.* at 59). Because there was no secular purpose that was not "fully served by" the prior statute, the subsequently-enacted statute could not be upheld as an accommodation to religion (*ibid.*).

[18] The court below divided with respect to the standard of review to be applied to the district court's findings. Compare J.S. App. 27a-29a (applying clearly erroneous standard) with *id.* at 44a-47a (Becker, J., dissenting) (concluding that plenary review is appropriate). For the reasons that we discuss in the text below, we do not believe that the standard of review is dispositive in this case. We note, however, that regardless of the standard of review applicable to the district court's factual determinations, the district court's characterization of a statute's purpose as "religious" or "secular" is a legal conclusion subject to plenary review on appeal. In addition, the factors favoring de novo review identified by the Court in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), would appear to weigh in favor of de novo review of factual findings in the Establishment Clause context as well. See *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring in the judgment).

to engage in prayer at some point during the school day" (*id.* at 27a-28a). The court of appeals further stated that "[g]iven the language of the New Jersey statute which * * * is permissive for students, and the record evidence, we do not believe a finding that the religious purpose was to encourage prayer over other alternatives, rather than to accommodate those wishing to pray, would be sustainable" (*id.* at 28a-29a).

We think the courts below failed to recognize the critical distinction between legislation removing obstacles to wholly voluntary religious observance, which is entirely permissible (see pages 18-23, *supra*), and that which endorses or promotes the practice of religion in general or of one religion in particular, which is impermissible (see *Jaffree*, 472 U.S. at 59-61). The district court's finding of a purpose to provide an "opportunity" for prayer simply demonstrates that the New Jersey statute falls within the former, permissible category.[19]

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[19] It is instructive to compare the New Jersey statute to the Alabama statute at issue in *Jaffree*. First, Alabama had enacted a moment of silence statute prior to the adoption of the statute at issue in *Jaffree*. The second statute could not be justified as an accommodation of religion or as an educational measure because those purposes already were fully accomplished by the existing moment of silence statute. See 472 U.S. at 58-59; *id.* at 65 (Powell, J., concurring); *id.* at 77, 83-84 (O'Connor, J., concurring in the judgment). Because New Jersey had no pre-existing moment of silence statute, the statute challenged in this case *is* supported by these secular purposes. Second, the Alabama statute's legislative history indicated that the purpose of the statute was " 'to return voluntary prayer' to the public schools" (*id.* at 57 (footnote omitted)). Here, by contrast, the district court found that the legislative history of the New Jersey statute evidences an intent to accomplish the secular purpose of accommodating religion (see J.S. App. 86a).

We note in addition that the Alabama statute expressly identified "voluntary prayer" as an activity permissible during the moment of silence while the New Jersey statute does not. We do not believe that the listing of prayer as a permissible activity automatically invalidates a statute under the Establishment Clause. As Justice O'Connor has observed, "[e]ven if a statute specifies

4. More fundamentally, we disagree profoundly with the approach adopted by the district court and approved by the court of appeals, in going behind the admittedly neutral face of the statute (J.S. App. 26a) to find legislative purpose in a combination of public sentiment and the selected comments of a small handful of legislators. In our view, when a plausible[20] secular purpose is apparent from the face of the statute or even from its official legislative history, there is a strong presumption in favor of accepting it, and that presumption generally should not be subject to impeachment by evidence of the specific motives of certain legislators. See *Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment); *McGowan* v. *Maryland*, 366 U.S. 420, 466 (1961) (opinion of Frankfurter, J.) ("[t]o ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted"). "Inquiries into congressional motives or purposes are a hazardous matter. * * * What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [the Court] to eschew guesswork." *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968) (footnote omitted); see also *Everson* v. *Board of Education*, 330 U.S. 1, 6 (1947). Only in extraordinary circumstances should such evidence of motivation be found sufficient to invalidate a permissible purpose established through more conventional means.[21]

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that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives" (472 U.S. at 73 (concurring in the judgment)).

[20] We emphasize that the purpose must be "plausible." A secular purpose that is clear on the face of the statute will not satisfy the *Lemon* test if it is a "sham." See *Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment); *id.* at 64 (Powell, J., concurring); *Stone* v. *Graham*, 449 U.S. 339 (1980) (per curiam).

[21] The Court has recognized that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into

Here, absent any finding that the facially neutral statute was applied by teachers in a way to encourage voluntary prayer (J.S. App. 26a), the district court relied substantially on the unrecorded comments[22] of Assemblyman Zangari, the principal sponsor of the bill (*id.* at 68a-71a). Zangari's cited statements suggest that he personally favored prayer in schools and had previously introduced two unsuccessful bills directed explicitly at advancing that objective. On this evidence, as well as very limited references to the views of a handful of other legislators,[23] the court concluded that "[t]he driving force behind the Bill came from those who deeply and sincerely believed that an opportunity for prayer in public schools at the beginning of each day should be mandated" (*id.* at 87a).

The court also made note of prior efforts by others to return prayer to the New Jersey schools (J.S. App. 67a), and to the opposition to the present legislation which primarily derived from hostility to any sort of prayer in

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the workings of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided'" (*Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977)).

This is not to say that a statute with a facially valid purpose may never be found to violate the Establishment Clause. But it will be the rare case in which evidence of the motivations of individual legislators so extensively documents the intentions of the legislators who voted for a bill that these individual motivations may be said to represent the purpose of the legislature as a whole. Cf. *Hunter* v. *Underwood*, 471 U.S. 222 (1985); *Epperson* v. *Arkansas*, 393 U.S. 97, 108 (1968). A party seeking to overturn a statute on this basis thus bears an extremely heavy burden.

[22] Since the New Jersey legislature does not preserve an official record of its hearings and debates, the court relied on the testimony of witnesses who attended the legislative committee meetings or otherwise heard comments which the court deemed relevant (J.S. App. 68a & n.2).

[23] The evidence cited by the court refers by name to three State senators and one assemblyman (J.S. App. 70a). The very limited comments attributed to them do not include any endorsement of officially sanctioned prayer in school.

school—whether silent and voluntary or otherwise (*id.* at 71a-82a). And it rejected as "an after-the-fact rationalization" (*id.* at 87a) the assertion that the bill had a wholly secular purpose to provide, by connoting seriousness and solemnity, a period of transition from outside life to the work of the school. Its conclusion in this regard rested on testimony which it found to demonstrate "beyond any doubt whatsoever" that one minute of silence as a transitional device "has little educational value" (*id.* at 84a).

The fact that a bill's sponsor might have preferred legislation more explicitly favorable to prayer in school, but was unable to effect its passage, does not at all suggest that the neutral statute that was adopted shares the same objectionable purpose. Nor can the plain intent of a statute, borne out by the neutral manner of its application, be undermined by the fact that those opposing enactment focused on the undeniable aspect of the statute's providing an opportunity for religious observance. Their opposition on this ground does not alter the statute's provision of a genuine opportunity for reflection by all students, to be put to whatever secular or religious ends they deem appropriate. Cf. *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 855-856 n.15 (1984) (statements made by opponents of legislation are entitled to "little, if any weight" in construing statute). Nor does the district court's pedagogical conclusion as to the uselessness of a silent interlude between outside life and school time alter the fact that the New Jersey legislature, for reasons known only to each legislator who cast a vote, plainly reached a contrary conclusion.

This Court's decision in *Jaffree* is fully consistent with our position in this case. There, the Court's determination regarding the statute's purpose rested primarily on legislative history, the text of the statute, and the fact that "[t]he State did not present evidence of *any* secular purpose." 472 U.S. at 57 (emphasis in original).[24]

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[24] The Court also relied upon the testimony of the sponsor of the bill that became the moment of silence statute, but that testi-

Jaffree thus turned in large part upon the absence of any plausible secular purpose, either on the face of the statute or otherwise. *Id.* at 59-60; *id.* at 66 (Powell, J., concurring); *id.* at 77-78 (O'Connor, J., concurring in the judgment). The Court did not indicate that inquiry into the motivations of individual legislators would be appropriate if the statute itself *had* evidenced a permissible purpose.

B. The Statute Does Not Have The Impermissible Effect Of Advancing Or Inhibiting Religion, Or Of Creating An Entanglement Between Church And State

The New Jersey statute, which provides for a moment of silence without prescribing how a student should use that moment, does not have any effect that this Court has identified as impermissible under the Establishment Clause. It is neutral among religions and therefore does not violate the Establishment Clause's command that "one religious denomination [not] be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see also *Gillette* v. *United States*, 401 U.S. 437, 449 (1971); *Zorach* v. *Clauson*, 343 U.S. at 314. All major religious faiths recognize silent prayer as an acceptable form of prayer. C. Whittier, *Silent Prayer and Meditation in World Religions* 7 (Cong. Res. Serv. May 27, 1982). Whatever one's faith, a moment of silence offers an opportunity for personal devotion; yet it is offensive to no one. A better example of "accommodation of all faiths * * * and hostility toward none" (*Lynch* v. *Donnelly*, 465 U.S. at 673) would be difficult to find.[25]

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mony simply reiterated that legislator's virtually identical statements in the legislative history.

[25] The district court found as a fact that the moment of silence instituted under New Jersey law is unsuitable for prayer by persons of some religious faiths (J.S. App. 88a), but provided no examples of religions that do not consider silent prayer as at least one acceptable mode of religious expression. Even assuming that such sects exist, the court's further conclusion that the moment of silence "prevents others from engaging in their form of prayer" (*id.* at 96a) is not correct. Adherents of such faiths, like those of

Nor does the statute promote a "symbolic union of church and state," because it does not "convey[] a message of government endorsement or disapproval of religion" (*School District* v. *Ball*, No. 83-990 (July 1, 1985), slip op. 16). As Justice O'Connor has observed, "a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise." *Jaffree*, 472 U.S. at 72 (concurring opinion); see also *id.* at 62 n.2 (Powell, J., concurring). Indeed, moments of silence are wholly neutral as between religious and nonreligious needs. Silence makes possible not only religious but nonreligious contemplation—both "prayer" and "meditation." And by the very nature of silence, the mind can be directed to wholly nontranscendental matters as well—to anything from God to homework to the girl or boy next door. Cf. *Jaffree*, 472 U.S. at 66 n.9 (Powell, J., concurring) ("[g]iven the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple 'moment of silence' as a time for religious prayer. There are too many other subjects on the mind of the typical child"). Moment of silence statutes thus do not "confer any imprimatur of state approval on religious sects or practices" (*Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981)).[26]

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no faith at all, remain free to meditate on secular subjects. Their religious liberty, even if not enhanced by the moment of silence, is in no way diminished. As the court of appeals stated in rejecting the district court's determination, "[t]he [moment of silence] statute simply does not address the problem of accommodating the beliefs of those whose prayer must be oral or otherwise self expressive. * * * It is * * * the compulsory school attendance law, not [the moment of silence statute] that 'prevents other persons from engaging in their kind of prayer'" (*id.* at 19a).

[26] The fact that some students may use the moment of silence for religious contemplation does not transform a neutral statute into government endorsement of religion. "By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the silent period." *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring in the judgment); cf. *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.10 (1981) ("by creating a forum the [State]

And this statute certainly does not infringe an indivdual student's constitutional right "to select any religious faith or none at all" free from interference by government in that choice (*Jaffree*, 472 U.S. at 53).[27] "During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Id.* at 72 (O'Connor, J., concurring in the judgment); *id.* at 62-63 & n.2, 66 n.9 (Powell, J., concurring); see also page 29, *supra*.

Finally, a moment of silence occasions no intrusion whatever by the state into church affairs or vice versa (cf. *Lemon* v. *Kurtzman*, 403 U.S. at 614), and thus entails no interference with "the essential autonomy of religious life" (*Marsh* v. *Chambers*, 463 U.S. at 803 (Brennan, J., dissenting)). There is no interaction between government and religious authorities and no need for inquiry into religious issues. Compare *Zorach* v. *Clauson*, 343 U.S. 308 (Court found no improper entanglement between government and religion even though school districts decided what "religious centers" would qualify for the released time programs and school officials reviewed weekly attendance reports from churches).

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does not thereby endorse or promote any of the particular ideas aired there"); *Zorach* v. *Clauson*, 343 U.S. at 311. All that the State has "endorsed" through a moment of silence is the view that religious observances by those who choose to engage in them should, where possible, be accommodated by government. Cf. *Wallace* v. *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment) ("[i]n assessing the effect of [a statute that lifts a government-imposed burden upon the free exercise of religion]—that is, in determining whether the statute conveys [to an objective observer] the message of endorsement of religion or a particular religious belief—courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes").

[27] The Court's decisions barring the practice of spoken prayer in school rest in part on the observation that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); see also *Abingdon School Dist.* v. *Schempp*, 374 U.S. at 223-224.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1986

ALAN J. KARCHER,

Appellant,

v.

JEFFREY MAY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE NEW JERSEY MOMENT OF SILENCE STATUTE DOES NOT LACK A SECULAR PURPOSE 4

A. The Court of Appeals' Examination of the Moment of Silence Statute's Secular Purpose was Overly Exacting and Improperly Relied upon Questionable Evidence 4

B. The Court of Appeals Improperly Failed to Recognize Religious Accommodation as a Permissible Secular Purpose 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES: Page

Corporation of the Presiding Bishop v. Amos, Nos. 86-179 and 86-1401 1

Edwards v. Aguillard, No. 85-1513 1

Hobbie v. Unemployment Appeals Commission 55 U.S.L.W. 4208 (U.S. February 25, 1987) 8

Lynch v. Donnelly, 465 U.S. 668 (1984) 9

Marsh v. Chambers, 463 U.S. 783 (1983) 9

May v. Cooperman, 780 F.2d 240 (3d Cir. 1985) *juris. postponed sub. nom., Karcher v. May*, 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551) ..... 2, *passim*

Wallace v. Jaffree, 472 U.S. 38 (1985) ..... 2, *passim*

Zorach v. Clauson, 343 U.S. 306 (1952) 3,9,10

OTHER:

W. Valente, *New Jersey's School Silent Contemplation Statute – Suspect and Unconstitutional*, 15 Education Law Reporter 447 (West 1984) 2,4,5

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League has had a long-standing interest in preventing the Establishment Clause from being interpreted in such an overly expansive fashion that religious institutions, individuals and values are not allowed to thrive. To this end the League has filed amicus curiae briefs before this Court in its most recent considerations of the Establishment Clause in *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179 and 86-1401 and *Edwards v. Aguillard*, No. 85-1513. This brief is another expression of this interest.

SUMMARY OF ARGUMENT

Prior to the court of appeals' decision to affirm the district court's ruling holding the New Jersey moment of silence statute unconstitutional on the basis of absence of secular purpose, one commentator described the district court's decision as a results-oriented ruling "in search of a constitutional foundation." W. Valente, *New Jersey's School Silent Contemplation Statute — Suspect and Unconstitutional,* 15 Education Law Reporter 447, 457 (West 1984). While the court of appeals confirmed the truth of this commentator's observations concerning the weakness of the district court's decision in its reversal of the district court's conclusions that the New Jersey moment of silence statute had the primary effect of advancing religion and excessively entangled the state in religious affairs, the court of appeals erroneously failed to reverse the district court's similarly flawed conclusion that the statute lacked a secular purpose.

The first difficulty with the court of appeals' ruling is that its deferral to the district court's factual analysis endorsed a judicial examination of the legislature's secular purpose which was both improperly exacting and reliant upon questionable evidence. In rejecting the district court's analysis dissenting court of appeals Judge Becker recognized that the evidence utilized by the district court in reaching its conclusion of absence of secular purpose was "equivocal at best, and much of it may be irrelevant." *May v. Cooperman,* 780 F.2d 240, 265 (3d Cir. 1985) (Becker, J., dissenting), *juris. postponed sub nom., Karcher v. May,* 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551). In addition, Judge Becker properly noted that "[t]he single unambiguous piece of evidence — the face of the statute itself — attests to the secular motives of the legislators." *Id.* The district court's use of questionable evidence and analysis was contrary to the seemingly more usual approach to the consideration of secular purpose under the Establishment Clause set out in Justice O'Connor's concurring opinion in *Wallace v. Jaffree,* 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment). This

approach would "find an improper purpose behind [a moment of silence] statute only if the statute on its face, in its official legislative history, or in its interpretation by responsible administrative agencies suggests it has the primary purpose of endorsing prayer." *Id.* at 75.

The court of appeals also construed the concept of secular purpose in an inappropriately narrow fashion by failing to recognize religious accommodation as a permissible secular purpose. This action seems contrary to the various opinions issued by this Court in *Wallace v. Jaffree,* 472 U.S. 38 (1985), which suggest that a moment of silence statute would be upheld if it did not encourage prayer over other possible activities. Indeed, this Court has long recognized the permissibility of government action to accommodate religion under the Establishment Clause. A requirement of a secular purpose independent of such accommodation appears inconsistent with the traditional allowance of such accommodations. Further, even if an accommodation's permissibility turned on its elimination of a government created obstacle to religious exercise, it is clear that such an obstacle is eliminated in this case. As in the "released time" program held constitutional in *Zorach v. Clauson,* 343 U.S. 306, 311-315 (1952), the moment of silence statute permissibly adjusts the schedule of public events to meet sectarian needs. *See Wallace v. Jaffree,* 472 U.S. at 73-74 n.2 (O'Connor, J., concurring). In the case of such an accommodation, "[i]t is disingenuous to look for a purely secular motive when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.* at 83. Thus, even if New Jersey's proffered transition to the school day rationale for the moment of silence law is rejected, the statute clearly has legitimate secular purpose of accommodation of religious exercise.

ARGUMENT

THE NEW JERSEY MOMENT OF SILENCE STATUTE DOES NOT LACK A SECULAR PURPOSE.

Prior to the court of appeals' decision to affirm the district court's ruling holding the New Jersey moment of silence statute unconstitutional on the basis of absence of secular purpose, one commentator described the district court's decision as a results oriented ruling "in search of a constitutional foundation." W. Valente, *New Jersey's School Silent Contemplation Statute — Suspect and Unconstitutional,* 15 Education Law Reporter 447, 457 (West 1984) (hereinafter *Valente*). The court of appeals' reversal of the district court's conclusions that the New Jersey moment of silence statute had the primary effect of advancing religion and excessively entangled the state in religious affairs, clearly points toward the weakness of the district court's reasoning in this matter. *See May v. Cooperman,* 780 F.2d 240, 247-250 (3d Cir. 1985), *juris. postponed sub nom., Karcher v. May,* 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551). Unfortunately, the court of appeals failed to also reverse the district court's conclusion that the statute lacked a secular purpose.

Amicus sees two basic problems with the court of appeals' analysis. Initially, the court's deferral to the district court's factual analysis endorsed a judicial examination of the legislature's secular purpose which was both improperly exacting and reliant upon questionable evidence. Second, the court's failure to recognize some notion of religious accommodation as an appropriate secular purpose erroneously narrowed the concept of secular purpose recognized in this Court's decisions.

A. The Court of Appeals' Examination of the Moment of Silence Statute's Secular Purpose was Overly Exacting and Improperly Relied upon Questionable Evidence.

In his dissenting opinion in the court of appeals, Judge

Becker extensively criticized the district court's overly exacting approach to the issue of the moment of silence statute's secular purpose and the district court's use of questionable evidence in reaching its conclusion of absence of secular purpose. *See May v. Cooperman,* 780 F.2d 240, 261-265 (3d Cir. 1985) (Becker, J., dissenting), *juris. postponed sub nom., Karcher v. May,* 55 U.S.L.W. 3512 (U.S. January 27, 1987) (No. 85-1551). This evidence included testimony of witnesses present at legislative hearings, newspaper accounts of these hearings, evidence of the perceptions of various citizens and citizens groups about the legislature's purpose, expert testimony about the statute's pedagogical value and prior attempts to pass moment of silence legislation. *See id.* at 261. Judge Becker concluded that this evidence was "equivocal at best, and much of it may be irrelevant." *Id.* at 265. He went on to note that "[t]he single unambiguous piece of evidence — the face of the statute itself — attests to the secular motives of the legislators." *Id.* The weakness of the evidence supporting the district court's conclusion of absence of secular purpose was also extensively criticized by a commentator in his discussion of the district court's decision. *See Valente,* at 450-455.

Judge Becker's criticism of the district court's utilization of questionable evidence, as well as the overly exacting nature of its examination of the legislature's secular purpose, appears well supported by the analysis contained in Justice O'Connor's concurring opinion in *Wallace v. Jaffree,* 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment). In that case, as in this case, the Court was confronted with the constitutionality of a moment of silence statute. Justice O'Connor stated:

> [T]he inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. In determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, the court has no license to psychoanalyze the legislators. If the legislature expresses a plausible secular

> purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims any intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent. It is particularly troublesome to denigrate an express secular purpose due to post-enactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of the statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." Since there is arguably a secular pedagogical value to a moment of silence in public schools, court should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

472 U.S. at 74-75 (O'Connor, J., concurring in the judgment) (citations and footnotes omitted). Justice O'Connor's observations seem consonant with this Court's traditional approach to the secular purpose prong of the establishment clause test. Her analysis would clearly appear to preclude utilization of much of the evidence used by the district court in finding an absence of secular purpose in this case. Further, her observation that an improper purpose is only to be found if it is "beyond purview that endorsement of religion or a religious belief was and is the law's reason for existence" would appear to require the upholding of the New Jersey statute since neither the face of the statute, official legislative history nor interpretation by a responsible administrative agency suggest that the statute has the primary purpose of endorsing prayer. Indeed, the court of appeals found that the involved statute did not have the purpose of endorsing prayer. 780 F.2d at 252. Particularly in light of the intervenors' assertion of some secular pedagogical value to the moment of

silence legislation, the court of appeals' analysis appears incompatible with the proper judicial approach to the question of a legislature's secular purpose. Thus, the decision of the court of appeals must be reversed.

B. The Court of Appeals Improperly Failed to Recognize Religious Accommodation as a Permissible Secular Purpose.

The court of appeals' decision also construed the concept of secular purpose in an inappropriately narrow fashion. Even if one were to agree with the lower courts' rejection of the state's articulated transition to the school day purpose for the moment of silence statute, it would seem that accommodation of religious exercise would constitute an appropriate secular purpose for the statute. However, the court of appeals appears to have held that accommodation of religious exercise is not a permissible secular purpose, at least in the absence of a specific government created obstacle to such religious exercise. *See* 780 F.2d at 252-253.

The court of appeals' narrow construction of secular purpose appears initially to conflict with this Court's apparent willingness to find constitutional moment of silence statutes which do not encourage prayer over other possible activities. *See Wallace v. Jaffree,* 472 U.S. 38 (1985). The three dissenting justices in *Jaffree* would have upheld a statute which went beyond the New Jersey statute by describing prayer as a permissible activity during the moment of silence. *See* 472 U.S. at 84-90 (Burger, C.J., dissenting), 472 U.S. at 90-91 (White, J., dissenting), 472 U.S. at 91-114 (Rehnquist, J., dissenting). Justice O'Connor apparently would have found constitutional statutes like this one which did not endorse prayer over other activities, *See* 472 U.S. at 67-84 (O'Connor, J., concurring in the judgment), and Justice Powell appeared to generally agree with her view. *See* 472 U.S. at 62-63 n.2 (Powell, J., concurring). Even the majority opinion appeared to envision that a statute might be constitutional if it "merely [protected] every student's right to engage in voluntary prayer during an appropriate moment of silence during the school

day." 472 U.S. at 59. The majority emphasized that this type of protection was afforded by an earlier Alabama statute whose constitutionality was uncontested. *See id.* This earlier Alabama statute is quite similar to the New Jersey statute at issue in this case, since it also does not single out prayer as a preferred activity during the moment of silence.

Certainly the implication of the various opinions in *Wallace v. Jaffree* is that a statute which provides a moment of silence for silent meditation, without specifically encouraging prayer during that moment, will conform to the Establishment Clause. *See* 472 U.S. at 72-75 (O'Connor, J., concurring in the result). Thus, the appeals court's claim that the New Jersey statute lacks a secular purpose, even though it fails to specifically encourage prayer,[1] is unpersuasive.

Amicus submits that this apparent conflict between the court of appeals' decision and this Court's decision in *Wallace v. Jaffree* stems, in large measure, from the erroneous nature of the court of appeals' conclusion that the accommodation of religious exercise is not an independently permissible secular purpose for a governmental action. A government action to accommodate religion, especially in the context of a Free Exercise Clause violation, clearly is permissible. *See Hobbie v. Unemployment Appeals Commission*, 55 U.S.L.W. 4208, 4210 (U.S. February 25, 1987). In *Hobbie* this Court observed that: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* In a case, such as this one, in which a government action accommodating religion neither has the primary effect of advancing religion nor excessively entangles the state in religious affairs, a requirement of a secular purpose independent of religious accommodation would appear inconsistent with the clear permissibility of such accommodation.

Even if it were held that religious accommodation might require elimination of a government created obstacle to religious exercise in order to constitute a legitimate secular

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[1] *See* 780 F.2d at 252.

purpose,[2] it is clear that such a purpose exists in this case. Unlike *Wallace v. Jaffree,* in which a moment of silence existed in Alabama schools prior to the enactment of the controverted statute, in the absence of the contested statute New Jersey has no moment of silence to begin the school day. This means that New Jersey students are in an analogous position to the students whose religious exercise was permissibly accommodated by released time provisions in *Zorach v. Clauson,* 343 U.S. 306, 311-315 (1952). The state established school schedule presented some obstacle to released time for religious classes in *Zorach* and also presents an obstacle for quiet prayer for students desiring it in the instant case. Neither religious exercise would probably have justified a judicially mandated Free Exercise Clause based exemption from the normal school schedule. However, *Zorach* appears to stand for the proposition that a state does not violate the Establishment Clause when it adjusts its public school schedule to eliminate obstacles to religious exercise contained in its school schedule. Justice O'Connor noted this fact in *Jaffree*

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[2] Some support for this rationale may be found in both the *Jaffree* majority opinion, 472 U.S. at 57-58 n. 45, and Justice O'Connor's concurring opinion, 472 U.S. at 81-84 (O'Connor, J., concurring in the judgment). Such a position is founded upon the idea that this type of accommodation furthers constitutionally protected free exercise of religion by eliminating the governmentally created obstacles to religious exercise which the Free Exercise Clause directly addresses. In the case of such an accommodation, Justice O'Connor has clearly noted that: "It is disingenuous to look for a purely secular motive when the manifest objective of the statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.* at 83.

While amicus agrees that religious accommodation laws of this type have a legitimate purpose, amicus also would note that this view may be inappropriately narrow. Government recognition of divergent religious customs, affairs and practices in various aspects of our public life might also be considered to evidence an appropriate secular purpose, while not necessarily lifting government-imposed burdens on religion. *See Lynch v. Donnelly,* 465 U.S. 668, 680, 681 (1984) (upholding government action creating Christmas display which had clear religious content as furthering secular purpose of recognizing religious origins of holiday). *Cf. Marsh v. Chambers,* 463 U.S. 783, 786, 795 (1983) (upholding a long-standing practice of starting legislative sessions with prayer in a case which did not resort to utilization of the tripartite Establishment Clause test).

when she stated: "[In *Zorach*] the Court stated that 'when the state encourages religious instruction . . . *by adjusting the schedule of public events to sectarian needs,* it follows the best of our traditions.' (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs." 472 U.S. at 73-74 n.2 (O'Connor, J., concurring in the judgment). Justice O'Connor also clearly noted that "[i]t is disingenuous to look for a purely secular motive when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Id.* at 83. Accordingly, lifting a government imposed burden on religious exercise by the adjustment of the school schedule for a moment of silence has the legitimate secular purpose of permissibly accommodating religious exercise. Thus, even if New Jersey's proffered transition to the school day rationale for the moment of silence law is rejected, the statute clearly has the legitimate secular purpose of accommodation of religious exercise.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Table of Authorities iv

Interest of Amici Curiae 1

Statement of Facts 2

Summary of Argument 2

Argument

I. Introduction 4

II. The Secular Purpose Dispute Cannot Be Resolved By A Formulaic Approach But Must Be Evaluated In Light Of The Larger, Background Conflict That Animates It 6

A. Even If One Conceives Of Secular Purpose In Formulaic Terms, One Must Recur To A Background Conception Of The Establishment Clause To Choose From Among The Contending Formulations 6

B. The Formulaic Approach Followed By The Circuit Court Below Is Inappropriate Because, To Use A Distinction Often Made In The Context Of The Jurisprudence Of Form, The Three Prongs Of The Tripartite Test Were Conceived More As Standards Than As Rules 8

III. One Of The Central Themes In The Development Of Modern Establishment Clause Doctrine Has Been The Waning Of An Older Paradigm Focused On Separation And The Emergence Of A Newer Paradigm Focused On Neutrality 10

A. Even As The Separation Paradigm That Served To Organize Early Establishment Clause Doctrine Was Being Conceived, The Very Image Of A Non-Interventionist Government To Which It Appealed Was, With The Death Of Laissez-Faire Capitalism, Passing Away 10

B. The Separation Paradigm, Like The Era To Which The Image It Evokes Corresponds, Is Now Anachronistic And No Longer Helps To Explain Or To Guide Modern Establishment Clause Doctrine Which Focuses On Overseeing, As Opposed To Renouncing, The Interface Between Religion And Government 12

C. A New "True Neutrality" Paradigm, In Which Accommodation Of Religion By An Interventionist Government Comprises The Central Theme, Has Been Emerging From Within The Shell Of The Older Separation Paradigm 13

1. The Premise Of The True Neutrality Paradigm Is That The Concept Of Neutrality, To Remain Constant In Real Terms, Must Receive Interpretations That Vary With Changes In The Role Of Government 13

a. The Example Of The Collectivist State Shows That The Degree Of Accommodation Appropriate Varies Directly (If Not Proportionately) With The Extent Of Government Involvement In The Social Order 14

b. The Idea Of Accommodation Is Derived From The Notion Of An Advance (In Religion), Which In Turn Presupposes A Concept Of An Original Position 14

2. The Effect Of Both The Older Separation Paradigm And The Newer Neutrality Paradigm Can Be Seen In The Conflicting Intuitions Generated By The Accommodation Issue 15

3. The Neutrality Paradigm, Which Holds Accommodation To Be A Function Of Context, Shows Why The Net Intuitive Balance Favoring *De Minimis* Accommodation Is Flawed 17

a. The *De Minimis* Version Of Accommodation Draws Inconsistently On Both Paradigms 17

b. The True Logic Of Neutrality Is Contextual And Does Not Fix A Particular Level Of Accommodation As Ideal 18

c. The Dangers Of The *De Minimis* Version Of Accommodation Theory 20

IV. The True Neutrality Paradigm Carries Forward The Very Precepts Of The Separation Paradigm That Made It An Appealing Conception And Adapts Those Precepts To The Realities Of Church-State Affairs In The Welfare State 21

A. General Implications Of The Neutrality Paradigm 21

B. Specific Implications Of The Neutrality Paradigm For The Public School Context 22

1. The Fallacy In The Traditional Analysis Turns On A False Equation Between Secular Public Schools And The Original Position 23

2. Accommodation Can And Must Play A Positive Role In The Theory Of Neutrality 25

V. Conclusion 25

TABLE OF AUTHORITIES

Cases **Page**

Abington School District v. Schempp, 374 U.S. 203 (1963) 24

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BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, OHIO, PENNSYLVANIA, TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLANTS

INTEREST OF AMICI CURIAE[1]

This case presents important issues relative to the meaning of the establishment clause. While *amici* do not believe the moment of silence in itself to be of great value to religious freedom, the issue it raises regarding the role of accommodation in a theory of the religion clauses is critically important. The lower courts in this case exhibited a common tendency to regard accommodation as constitutionally suspect, particularly where the accommodation arises as a result of an explicit decision by government to take religion into account in its structuring of the social order. The Rutherford Institute believes that this tendency misconceives the important role of accommodation in establishment clause doctrine.

[1]Counsel of Record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

Amici Curiae are nonprofit religious corporations named for Samuel Rutherford, a seventeenth-century Scottish minister and rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts as set forth in Appellants' brief filed with this Court.

SUMMARY OF ARGUMENT

The Circuit Court below was preoccupied with the appropriate rendering of the secular purpose requirement. This approach mistakenly focuses on the formulaic dimension of the secular purpose test; as a matter of the jurisprudence of form, the tripartite test has more of the character of a standard than of a mechanical rule. The formulaic approach cannot, in any event, obviate the need to resolve the conflict between background conceptions, for one must resolve that conflict in order to choose among the contending formulations.

The changes in political philosophy implicit in the development of American society have had perhaps more of a distorting effect on establishment clause doctrine, because of its strong connection to an historical understanding, than on any other area of constitutional law. Twentieth-century establishment clause doctrine, in its formative stages, was guided by a paradigm that, although not perhaps directly derived from an historical understanding,

drew heavily on images appropriate to that earlier era. In particular, early establishment clause doctrine drew on an image of separation that pictured government and religion in discrete terms, as if there were discernible boundaries that marked off the separate spheres of religion and government; the critical characteristic of this conception was its commitment to the notion that government and religion occupied mutually exclusive, independent territories, that each could carry on its business without trenching upon the affairs of the other. The problem was that even as this Separation Paradigm was being articulated at the middle of this century, the extremely limited government model it presupposed was, with the death of laissez-faire capitalism, passing away.

Much of modern establishment clause doctrine has focused on monitoring and shaping, as opposed to renouncing, the interface between government and religion. As a consequence, the Separation Paradigm, which can explain such interfaces only as an exception to the rule, has slowly lost its explanatory power. In its place, one can detect the outlines of a new emerging paradigm focused on neutrality. Accommodation, far from serving as an exception to the rule, plays a central role in the emerging theory of neutrality.

The premise of the Neutrality Paradigm, which explains the growing role of accommodation in the context of our modern welfare state, is that the true logic of neutrality is contextual. While the new paradigm does not dictate results in particular cases, it can serve as a conceptual framework that orients courts to more general boundaries.

The primary value of the new paradigm is in locating the role of accommodation within a coherent theory of the religion clauses. On the most elemental level, it shows that there is nothing in principle wrong with government taking religion explicitly into account in its structuring of the social order. In applying this insight to the present case, it is obvious that the point over which the Court below stumbled—the legitimacy of the purpose to accommodate religious belief—is completely benign from a constitutional standpoint.

ARGUMENT

I.

Introduction

The debate over the moment of silence concept, as it has developed not only in this case but also in numerous others, has an almost surreal quality to it. It would be easy enough to understand the intensity of the debate and the attention given to the idea by various state legislatures if all that were involved were an ill-conceived attempt by the states to re-introduce prayer into the schools. Polls have shown that, despite this Court's pronouncements on the subject and the obvious unneutrality in state-sponsored prayer, many people, if not the majority of the public, still favor school prayer. So it would not be altogether surprising to find some manifestation of this public sentiment surfacing at the legislative level.

Yet it would take an unstinting cynicism to see in this case only a clumsily effected surreptition. For it seems clear that the New Jersey legislature genuinely sought to draft a law that actually (not just apparently) conformed to this Court's pronouncements regarding state endorsement of prayer. It may, of course, be true that some legislators privately hoped that the law would effect a reintroduction of state-sponsored prayer. But the law is scarcely designed to have that effect, as even the Circuit Court below concluded, *see May v. Cooperman,* 780 F.2d 240, 248-50 (3d Cir. 1985), and it would thus take an unduly pessimistic view of the aptitude of legislators to believe that that is what they were trying to do. That the law had as one of its aims the accommodation of a modicum of religious voluntarism can, on the other hand, scarcely be denied. But whatever the legal significance of such an intent, there is an enormous factual difference between an intent to accommodate religious voluntarism and an intent to advance religion itself.

It is, however, just this distinction which gives the moment of silence issue its surreal quality. For if the picture of the legislature striving awkwardly, ineffectually, and—one is

bound to say (at least if one takes this view seriously)—stupidly to smuggle an endorsement of prayer back into the schools via the seemingly sterile moment of silence law is indeed a caricature of reality, as we think it is, then it is difficult to see what the stir is all about.

From a religious perspective, it is hard to see that much of significance hangs on the right to a moment of silence. For one thing, students already have the right to pray silently, if only because it is not (given current technology) possible to stop them. For another, it is hard (even for those who believe, as we do, in the value of prayer) to believe that the incremental prayer achieved, if any, in the moment of silence will have the kind of critical value that would explain the attention given to it.[2] We feel sure that those who live a life of prayer would be neither sustained by such an opportunity, if it existed, nor turned aside from a path of devotion, if it were denied.

Nor is it likely that those for whom prayer is at most a passing concern will be induced thereby to become men and women of prayer. While it is difficult to project precisely what the religious impact of such a law might be, those whose concern is the spiritual character of Americans would, from all appearances, be better advised to focus their energies elsewhere. Indeed, we feel that if religion in America has come to the place that anything of significance, much less the continued vitality of religion, hinges on the right to a moment of silence, then it would be better for religion itself that the right, such as it is, be denied.

In our view, then, while the law at issue has little, if any, value to religion, the legislative purpose to accommodate religion to this extent is at the same time, and partly for this reason, almost completely benign. We can now make clear our purpose in this somewhat lengthy introduction: we wish first of all to distinguish what we see as the real significance

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[2]This is not in any way meant to demean the value of prayer. Rather, as is made out more fully below, we wish to make clear our disdain for the idea that true religion is such a puerile, desiccated thing that it should be grateful for a state-orchestrated moment of silence. By the same token, we find almost ludicrous the idea of such an insipid practice being driven from the schools as an establishment of religion.

of this case from these other more ephemeral concerns, and second, to prevent our genuine conviction that the case is significant in one respect from being mistaken as any kind of solicitude for the moment of silence itself. We write not to plead for a moment of silence, much less to plead for it in the name of religion, but with an eye toward the larger issues of constitutional philosophy reflected, if only dimly, in the outlines of the struggle here.

II.

The Secular Purpose Dispute Cannot Be Resolved By A Formulaic Approach But Must Be Evaluated In Light Of The Larger, Background Conflict That Animates It.

A. Even If One Conceives Of Secular Purpose In Formulaic Terms, One Must Recur To A Background Conception Of The Establishment Clause To Choose From Among The Contending Formulations.

The larger, background conflict can be stated in terms of the argument over secular purpose that occupied both courts below. *See, e.g., May v. Cooperman,* 780 F.2d 240, 250-53 (3d Cir. 1985). But precisely because its resolution turns on a conflict of larger dimensions, merely stating the conflict in terms of the secular purpose requirement does not illuminate it. Of course, just as the conflict itself could be expressed in terms of the secular purpose issue, so could any particular outcome of that conflict. What is important is not the semantical rendering of that outcome, whether in terms of secular purpose or some other test, but that the outcome, however expressed, properly takes into account the major principles at stake.

In theory, if one could identify a particular, discrete and clear version of the secular purpose requirement, the only remaining task would then be to apply the legal construct so conceived to the facts of the case at hand. The facts thus marshalled would, in turn, yield a correspondingly discrete and definite solution (conveniently framed in the very terms

of the inquiry): secular purpose *vel non*.[3] Without a clear version, one could know everything in the world about the intent of the legislators and still not have a clue as to the existence of secular purpose. The Circuit Court below proceeded as if such a clear version existed, and had indeed been applied correctly by the District Court to discover a forbidden religious purpose, which was, more specifically, the "purpose of accommodating the religious beliefs of some students." Treating the notion of "purpose," so defined, as unambiguous,[4] the Court hesitated momentarily

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[3]Putting the question in this way—in dichotomous terms, as if there were always a yes or no answer—makes it plain that the question is not merely factual, but heavily legal. Facts rarely come in such a clear-cut form, but legal tests of this type require us to view every set of facts as if they had such a form. To put it differently, such tests require us to impose this form onto a more complex reality. *See* Leff, *Law And,* 87 Yale L.J. 989 (1978). For this reason, Judge Becker is clearly correct in asserting that the finding of religious purpose by the District Court is not simply a factual finding to which this Court must largely defer, but a complex legal conclusion subject to this Court's review.

[4]There are, however, real problems with treating it as unambiguous. For example does a purpose to accommodate religious beliefs still constitute a religious purpose if it is only a subordinate aim? Would it make a difference if the purpose was a strong secondary purpose, or would even a tertiary subordinate purpose sufficiently taint the psychological profile of the legislators to disable the constitutionality of their overall aims? More subtly, what if the legislators viewed accommodation as a *negative* aim or condition of the law, such that the legislators would be happy with the law if it succeeded in inculcating an orderly secular atmosphere at the commencement of the school day, but only if this could be achieved in such a way as to avoid *requiring* secular contemplation?

As discussed further below, these versions do not even touch on the more difficult issues hidden within the concept of secular purpose, but all of these versions are linguistically plausible accounts of what a legislator who said, "My hope is that this law will accommodate the religious beliefs of some students," might have meant. The point, however, is not to suggest that the secular purpose requirement entails irresolvable factual complexity. Rather, the point is that the notion does not have a self-evident *legal* meaning.

over the question whether a definition of religious purpose that included a purpose to accommodate religious beliefs as religious was constitutionally sound, before concluding, though not apparently without some misgivings,[5] that it was.

Now the interesting thing, for our purposes, is that the Court below seemed confident that the answer to its question—whether a purpose to accommodate the religious beliefs of some students was constitutional—could be found in one or another formulation of the secular purpose test. And this is interesting precisely because, as we began by saying, the answer could in theory have been expressed in such terms. And since this question of accommodation is obviously so central to an understanding of the religion clauses, one has to wonder why its answer has not, as the Court below discussed, been formulated in these terms.

B. The Formulaic Approach Followed By The Circuit Court Below Is Inappropriate Because, To Use A Distinction Often Made In The Context Of The Jurisprudence Of Form, The Three Prongs Of The Tripartite Test Were Conceived More As Standards Than As Rules.

The reason for this, it would seem, is that the *Lemon v. Kurtzman,* 403 U.S. 602 (1971), tripartite test was never intended to function as a mechanical rule, and has not developed in a manner that would make it amenable to that end. To use the distinction often made in the context of the jurisprudence of form, the tripartite test seems to have been intended to serve more as a standard than as a rule; it was not designed to have "formal realizability" across the general sweep of cases, but as a sort of guidepost to orient courts in the development of particular rules on a case-by-case basis. *See, e.g.,* Kennedy, *Form and Substance in Private Law*

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[5]The Court specifically observed that it did "not find any clear answer in *Wallace v. Jaffree,*" which was, somewhat paradoxically, the Court's principal, if not its only, source for determining the answer to this question. *See May v. Cooperman, supra* at 252.

Adjudication, 89 Harv. L. Rev. 1685 (1976) (discussing jurisprudence of form issue). Even the distinction between standards and rules does not fully capture the formal qualities of the tripartite test, because the test does not function as a standard in the conventional sense of a clearly articulated general goal, such as "capacity to contract." Rather, the tripartite test is best understood as an attempt to formalize the different dimensions of the basic establishment clause goal of achieving government neutrality with respect to religion. Hence, one cannot determine from one or another extant formulation of the secular purpose requirement whether a purpose to accommodate religious beliefs is secular in the required sense.

This is not to say that establishment clause doctrine does not speak to the question of accommodation. On the contrary, there is much in the way of establishment clause doctrine that can be brought to bear on that subject. But this is precisely the point, that in order to give a meaningful answer to the question whether a purpose to accommodate religious beliefs is a "secular" purpose, one must recur to background conceptions of the establishment clause itself. The Circuit Court, in its myopic fascination with the formulaic dimension of the secular purpose test, never even considered the broader concepts of establishment clause doctrine relevant to the issue. Yet, if there is nothing in this Court's specific formulation of the secular purpose requirement, neither is there anything intrinsic to the notion of "secular" as a general matter that would tell us whether an attempt to accommodate religious beliefs, as distinguished from encouraging them, was secular or religious in nature; all depends upon the role that that distinction plays in effectuating the broader goals of the establishment clause. So it is to a discussion of these broader goals that we now turn.

III.

One Of The Central Themes In The Development Of Modern Establishment Clause Doctrine Has Been The Waning Of An Older Paradigm Focused On Separation And The Emergence Of A Newer Paradigm Focused On Neutrality.

A. Even As The Separation Paradigm That Served To Organize Early Establishment Clause Doctrine Was Being Conceived, The Very Image Of A Non-Interventionist Government To Which It Appealed Was, With The Death Of Laissez-Faire Capitalism, Passing Away.

At the core of the modern interpretation of the establishment clause has always been a concern for governmental neutrality toward religion. In the seminal cases decided at the middle of this century, this concern for neutrality was expressed as a proscription against government action that either advanced or inhibited religion. *E.g., Everson v. Board of Education,* 330 U.S. 1 (1947). At that time, it was still possible to conceive of government and religion in discrete terms, as if there were discernible boundaries that marked off the separate spheres of religion and government within which, in the normal course of things, each was expected to remain. The critical characteristics of this conception was its commitment to the notion that government and religion occupy mutually exclusive, independent territories, that each could carry on its business without trenching upon the affairs of the other. The wall of separation metaphor, evoking, as it did, the image of separate territories, was a natural handmaiden to this background conception. It was, from the standpoint of logical clarity and symmetry, an admirable and appealing conception.

The problem was that even as this Separation Paradigm was being born,[6] the era to which it might possibly have

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[6]The conception of a true neutrality toward religion was clearly a twentieth-century conception. To the extent the framers even conceived of the establishment clause as requiring neutrality, most of them would have thought of it in very different, which is to say much less secular, terms. For them, neutrality would most likely have meant neutrality

applied was rapidly dying out. For this conception was articulated, with an eye toward the era that began with the framers, even as the country, and with it, the rest of constitutional law, was making a transition from the limited government model associated with laissez-faire capitalism to the model of government intervention associated with welfare capitalism. *cf.* Ackerman, *Beyond Carolene Products,* 98 Harv. L. Rev. 713 (1985) (discussing the transition). In the context of the extremely limited government with which the framers were familiar, the idea of separate spheres for religion and government may well have been a workable conception.[7] So too it might have been adapted to the era of laissez-faire capitalism that ended, at least insofar as constitutional philosophy is concerned, in 1937.

But it simply cannot accommodate the very different problems associated with modern government in a welfare state. As a consequence, the Court ran into trouble with the wall of separation metaphor almost from the start. Thus, for example, in *Everson,* 330 U.S. 1, 11-12 (1947), the Court approved the provision of government transportation to children attending parochial schools even while brandishing the admonition that it would not tolerate the slightest breach in the wall of separation. Similarly, in *Board of Education v. Allen,* 392 U.S. 236 (1968), the Court approved the loan of secular textbooks to students in private religious schools.

(footnote 6 continued)

among the different Jewish and Christian sects, or, in other words, acceptance of some form of theism. *See generally,* R. Cord, *Separation of Church and State: Historical Fact and Modern Fiction* (1982). The notion that the establishment clause requires neutrality between religion and irreligion, while appropriate given the vastly different cultures of the twentieth and eighteenth centuries, is a distinctly modern notion.

[7]That is to say, it is a conception that might have been consistent with, though it is certainly different from, the concept of establishment held by the framers. In his later life, Madison worked out a quite similar conception, but his views probably represent a minority viewpoint. *See,* E. Fleet, Editor, *Madison's "Detached Memoranda,"* 3 William and Mary Quarterly 535 (1946).

B. The Separation Paradigm, Like The Era To Which The Image It Evokes Corresponds, Is Now Anachronistic And No Longer Helps To Explain Or To Guide Modern Establishment Clause Doctrine Which Focuses On Overseeing, As Opposed To Renouncing, The Interface Between Religion And Government.

Those decisions, marking out what would constitute exceptions if viewed within the framework of the Separation Paradigm, have not proved to be aberrations. In fact, far from pressing the separation theme, much of modern establishment clause doctrine is devoted to overseeing (as opposed to preventing) the interface between religion and government. The public benefit principle, under which religious persons and institutions are permitted to share equally with others in the benefits of general government programs, is one prominent example. *See Mueller v. Allen,* 463 U.S. 388 (1963); *Witters v. Washington Commission for the Blind,* 474 U.S. ____, 106 S. Ct. 748 (1986); *Walz v. Tax Commission,* 397 U.S. 664 (1970). Another example is the secular use concept, under which religious institutions may participate in government aid directed specially to them, so long as the aid is restricted to secular purposes. *See Board of Education v. Allen,* 392 U.S. 236 (1968); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Wolman v. Walter,* 433 U.S. 229 (1977). Yet another is the implicit limitation on the scope of the definition of religion for establishment clause purposes, which is necessary to modulate the more intense connections between government and religion that characterize today's welfare state. *See, e.g.,* Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1056, 1085-86 (1978).

Partly, if not largely, for this reason, the Separation Paradigm which, in one form or another, had served as the guiding paradigm of modern establishment clause doctrine, seemed to be almost completely in tatters by the early 1970s. *See, e.g., Lemon v. Kurtzman,* 403 U.S. 602, 612-14 (1971). By that time, it was no longer possible to explain the overall fabric of the law in terms of the old paradigm; but neither was a new paradigm ready to take its place. It was at

this point that this Court announced the new three-part test. *Id.* At the outset, this Court specifically disavowed any attempt to set forth general principles. *Id.* If by general principles, one means to refer to a regime of formally realizable rules of general application, then it is certainly true that general principles will not do; it is simply not practicable to try to anticipate under a few general headings the incredibly varied and numerous church-state problems of today's society.

C. A New "True Neutrality" Paradigm, In Which Accommodation Of Religion By An Interventionist Government Comprises The Central Theme, Has Been Emerging From Within The Shell Of The Older Separation Paradigm.

It is, however, possible to point to the emergence of a new background conception or paradigm, which we shall call the True Neutrality Paradigm, which can serve on a very general level as a frame of reference to orient courts in particular cases. While such a conception would not dictate obvious results in particular cases, it would have the most salutary effect of making argument about many issues much more intelligible. It would serve the function of what Professor Bruce Ackerman has in another context denoted by the phrase "Comprehensive View." *See* B. Ackerman, *Private Property and the Constitution* (1976). This conception is already implicit in this Court's doctrine and has been adumbrated by several commentators, though its application to the public school context has yet to be made explicit.

1. The Premise Of The True Neutrality Paradigm Is That The Concept Of Neutrality, To Remain Constant In Real Terms, Must Receive Interpretations That Vary With Changes In The Role Of Government.

As several commentators have observed, the concept of neutrality, to remain constant in real terms, must receive interpretations that vary with changes in the role of govern-

ment.[8] *E.g.*, Tribe, *American Constitutional Law*, 834 (1978) (movement from government of closely limited powers to affirmative state requires reevaluation of religion clauses; in affirmative state, religious tolerance may become "positive commitment that encourages the flourishing of conscience" rather than simply "negative principle"); Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development* (Pt. 2), 81 Harv. L. Rev. 513, 514-15 (1968).

a. The Example Of The Collectivist State Shows That The Degree Of Accommodation Appropriate Varies Directly (If Not Proportionately) With The Extent Of Government Involvement In The Social Order.

Professor Gianella, in his landmark article on the establishment clause, used the example of the hypothetical collectivist state to illustrate this idea. In the context of a limited government, a distribution of property from government to religion would, in general, tend to advance religion. But a state that controlled all resources (Gianella's hypothetical collectivist state) would have to make government property available for the use of religious groups in order to avoid inhibiting religion. As Gianella indicates, the very concept of neutrality that proscribes a distribution of property in the former case would demand it in the latter case.

b. The Idea Of Accommodation Is Derived From The Notion Of An Advance (In Religion), Which In Turn Presupposes A Concept Of An Original Position.

It is easily seen how this conception relates to the notion of accommodation. The basic problem presented by accommodation is whether the particular accommodation at issue advances religion in some degree. And the principal difficulty in assessing any such claim is that it is impossible to evaluate whether or not a particular accommodation advances religion without a frame of reference that defines as

[8]The only other alternative is to hold the role of government constant.

normative some state of affairs. For the very notion of an *advance* presupposes an original position[9] (with reference to which the current state is an advance). The confusion in present doctrine with regard to the role of accommodation derives from the fact that the concept of an original position, though indispensible as a logical matter, has remained only implicit. Thus, its role as a normative standard has remained shadowy; as a consequence, the critical questions regarding what the normative standard is or should be tend to get resolved on a merely intuitive level.

2. The Effect Of Both The Older Separation Paradigm And The Newer Neutrality Paradigm Can Be Seen In The Conflicting Intuitions Generated By The Accommodation Issue.

In particular, there are two sets of typical intuitions, at cross-purposes with one another, concerning the original position that affect and confuse judgments about the legitimacy of accommodation. On the one hand, there is a strong intuitive tendency to view any accommodation of religion as a benefit to religion (*i.e.*, as an advance). This intuition derives directly from the background conception that assigns separate and discrete spheres to religion and government. From the standpoint of this Separation Paradigm, any benefit flowing from government to religion constitutes a presumptively illegitimate benefit. This conception plays upon our tendency to think of the present state of affairs as normative, so that any new benefit conferred automatically constitutes an advance. If, today, bus transportation is not provided to parochial school students, but tomorrow it is, one who is oriented to today as normative will tend to see tomorrow's benefit as an advance. The problem here is the arbitrary identification of the present as

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[9]The phrase "original position," as used here, is not meant to invoke the notion of an original position as used in the work of Rawls. J. Rawls, *A Theory of Justice* (1971).

normative.[10] In a subtle way, the background conception associated with the Separation Paradigm leads us to think of the present as a state of mutual non-intervention, that is, as it is portrayed for us in that paradigm, and thus reinforces the natural tendency to view the present as normative.

Yet, on another level, there is an almost equally strong intuitive tendency to view accommodations as reasonable and equitable. This intuition derives from the background conception that we are advancing here. Thus, it seems reasonable to us that Gianella's collectivist state should permit religious groups the use of property. There are two intuitive paths to this result. First, there is a tendency to think of (some degree of) private ownership of property as normative. Hence, we tend to see the provision of property by the collectivist state as merely restoring the normative condition and not as advancing religion. Second,[11] if we distance ourselves from the view of private property as normative, we tend still to imagine that the state has an obligation to allocate social resources in a manner sensitive to private impulses. Hence, we would view a state that denied access to property to religious groups as unfairly inhibiting religion

[10]This conception is all the more intuitively attractive in the legal context because of the traditional concept of lawsuits as being for the purpose of deciding the immediate interests of actual parties. This imposes an implicit limitation on the context to which a court is able to refer in determining what is or is not an advance. *cf.* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 Harv. L. Rev. 1 (1979) (discussing role of courts in developing structural solutions).

[11]Both of these versions appeal to the same meta-principle of voluntarism. The first case supposes an original position of parity between government and religion in which true voluntarism rules: Government does not interfere with religion and religion does not overreach itself by extracting special dispensations from government. Accommodation is thus justified in this view as a move back to true voluntarism, or, if you will, to the original position. The second case appeals directly to a notion of voluntarism. In that view, government action frustrating voluntarism must be rescinded or countermanded by action that *enables* true voluntarism. Just as the first case implicitly rests on a notion of voluntarism, so the second case implicitly rests on a notion of an original position, for without such a frame of reference, we should not know that anything was amiss.

because such action frustrated the unadulterated, or purely voluntary, private impulse.

In effect, Gianella's example of the collectivist state uses our very tendency to see the present as normative to show us that it is not. For by positing the hypothetical case, he creates a second "present" for us to contend with (the "present," which is to say the time immediately preceding a move toward accommodation, of the hypothetical). But the abstract "present" of the hypothetical easily loses out in our intuitive grasp of a normative world to the real present of our experience. Hence, it seems natural to correct the "present" of the hypothetical to comport with intuitions generated out of our current reality. But doing this gives the game away; for then it is clear that the present, or the time immediately preceding a move to accommodation, is not *in principle* the original position or natural point of normative reference.

3. The Neutrality Paradigm, Which Holds Accommodation To Be A Function Of Context, Shows Why The Net Intuitive Balance Favoring *De Minimis* Accommodation Is Flawed.

a. The *De Minimis* Version Of Accommodation Draws Inconsistently On Both Paradigms.

The net result of the clash of these two strong intuitions is a general view that certain kinds of accommodations are acceptable, so long as they do not benefit religion too much. In effect, the overlay of the True Neutrality Paradigm onto the Separation Paradigm produces, though illogically, a strong net intuitive tendency to create a *de minimis* exception to the general principle that religion should not benefit at the hands of government. In that view, the question of the legitimacy of accommodation becomes a matter of degree. In effect, the intuitive balance produces something like an absolute rule favoring minimal accommodation. As discussed further below this may, though for entirely different reasons, approximate the conclusion generally appropriate to a welfare state.

b. The True Logic Of Neutrality Is Contextual And Does Not Fix A Particular Level Of Accommodation As Ideal.

But the true logic of neutrality does not fix any given level of accommodation as inherently optimal. The contrast of the model of extremely limited government that the Separation Paradigm draws upon with Gianella's collectivist state shows that the degree and nature of accommodation vary directly (though not necessarily proportionately) with the extent of government control over the social order.

It is worth emphasizing the connection between the Separation Paradigm and the limited government model, because it brings out why accommodation is a contextual question and underscores the fallacy of trying to use the Separation Paradigm as a model to guide establishment clause adjudication in our modern welfare state. By hypothesis, the Separation Paradigm encompasses as ideal the extreme case in which there is no overlap between the respective jurisdictions of church and state. Each remains discretely within its own sphere.

This entails, by definition, a model of extremely limited government. In actuality, as far as church and state are concerned, it is a model of no government, or of basic anarchy, because there is no unitary government order governing the respective territories of each. What minimal relationships exist between the two are, in this model, somewhat analogous to the relationship of nations under international law. In this context, government support of religion would clearly violate neutrality by advancing religion.

Professor Gianella's collectivist state comprises the model of the other extreme of complete socialism. In this model, the government has full control over the social order, including ownership of all property. In this context, the failure of government to accommodate religion by making government property available for religious use would clearly violate neutrality by inhibiting religion. Accommodation, in this context, clearly constitutes a move in the direction of neutrality.[12]

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[12]Whether it is a sufficient move is a question outside the scope of the present discussion. It is doubtful that establishment clause doctrine could be adapted this far without doing violence to the particular

These two extremes are suggestive of the application of neutrality to contemporary government:

> Contemporary government does not, of course, exercise the dominance of the collectivist state, and the sort of restorative measures that would contribute to neutrality in the collectivist state would serve demonstrably to advance religion if effected by contemporary government. Nevertheless, contemporary government does exert influence over resources and activities whose control is of central concern to religious groups, making applicable the principle, though not the specific prescription, deducible from the collectivist state.[13]

This same conclusion is implicit not only in much of modern First Amendment doctrine, but also in the structure of church-state affairs. The accommodation of religious programming by earlier FCC regulations designed to ensure the survival of religious programming under a regime of partial government control, the accommodation of religious expression under the limited public forum doctrine of *Widmar v. Vincent,* 454 U.S. 263 (1981), the public benefit principle, and the secular-use concept all are doctrinal adjustments to the age of the welfare state that operate to shape the character of governmental intervention in the social order in such a way as to ameliorate its negative impact on religious interests. It would therefore seem beyond argument that there is, in principle, nothing inherently unconstitutional about a purpose to accommodate religious beliefs.

(footnote 12 continued)

character of the neutrality that the clause envisions. However that may be, the salient point here—that accommodation would in that context increase, rather than detract from, neutrality—is unaffected.

[13]Note (Dencer), *The Establishment Clause, Secondary Religious Effects, and Humanistic Education,* 91 Yale L.J. 1196, 1199 n. 21 (1982).

c. The Dangers Of The *De Minimis* Version Of Accommodation Theory.

As we suggested at the outset, the appeal of the separation conception is based on an orientation to a society that no longer exists (if it ever did). While this Court has formally abandoned such a conception,[14] the failure of a new paradigm, such as the one mentioned here, to take its place leaves room for the old conception to exert a strong influence on an intuitive level, if only because, as the saying goes, "nature abhors a vacuum." The notion of *de minimis* accommodation to which it (in conjunction with the influence of the emerging Neutrality Paradigm) leads is dangerous for two reasons. First, it leaves open the possibility that unjustified benefits to religion will be treated as acceptable by courts on *de minimis* grounds. Second, it casts an illegitimate pall over actions designed to enable true voluntarism. Despite its intuitive appeal, the old Separation Paradigm,[15] as applied to most instances of accommodation today, involves a patent solipsism: it appeals to an image of separation to prevent an accommodation that is necessary precisely because the imagined separation does not exist.

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[14]We should emphasize that the Separation Paradigm we refer to here is the image that corresponds to the rule of strict separation. While very few scholars, for example, would today hold to a rule of strict separation, many are probably still unconsciously influenced by what we are here calling the Separation Paradigm, if only because it is a simple and natural image.

[15]What we say here should not be taken as denying the validity of separation as a general principle. Without question, some core degree of separation is necessary to religious liberty. Indeed, for that reason, the establishment clause would presumably stand as a bar to the formation of Gianella's hypothetical collectivist state. Thus, the state presumably could not take away all the property of religious institutions, even if it agreed to arrange provisions accommodating religious voluntarism. What we are rejecting, rather, is the illusory image, or, as we have termed it, background conception, which illogically undermines the basis of legitimate accommodations by conjuring up a nonexistent normative world as a standard of comparison.

IV.

The True Neutrality Paradigm Carries Forward The Very Precepts Of The Separation Paradigm That Made It An Appealing Conception And Adapts Those Precepts To The Realities Of Church-State Affairs In The Welfare State.

A. General Implications Of The Neutrality Paradigm.

The alternative True Neutrality Paradigm is in fact merely an adaptation of the earlier Separation Paradigm designed to fit the key precepts of that earlier paradigm to the changed circumstances of a modern governmental order. The Separation Paradigm fits the limited government model. But its ideal of mutual nonintervention cannot be achieved in an age when government has expressly undertaken all kinds of responsibilities that affect the interests of religious groups and persons. If nonintervention were itself a value that inhered in the establishment clause, one might argue against the constitutionality of the welfare state on establishment clause grounds. But nonintervention is merely instrumental to the ultimate value of neutrality. Yet, just as neutrality is preserved in the original position of nonintervention imagined by the Separation Paradigm, so the intervention by government into affairs touching on religious interests upsets the equipoise entailed by nonintervention and endangers neutrality.

The obvious response to this problem is for government to take religious interests into account, with a view toward protecting religious voluntarism, in its management of the social order. Such forms of *accommodation* carry forward the precepts of the Separation Paradigm and adapt them to the complex realities of modern church-state affairs. In this sense, the True Neutrality Paradigm we have argued for here is simply the next stage in the conceptual evolution of First Amendment doctrine. It is, in a word, the Separation Paradigm come of age.

We have thus far discussed only the general contours of the role of accommodation in a theory of neutrality. There

are, obviously, a host of subordinate questions that would have to be answered in the development of a mature theory. But our purpose here is merely to identify the general outlines of such a theory for the light they shed on the issue of accommodation in general.

Nothing we have said implies that accommodation is always required, or dictates what degree of accommodation is required, or indicates what manner of accommodation is appropriate. Each of these issues requires a more refined notion of neutrality than is necessary for the present discussion. Similarly, the theory of neutrality does not, as a general matter, imply that accommodation will always be sufficient to ameliorate the unneutral effects of governmental intervention. There are surely cases, such as envisioned by Professor Gianella's collectivist state, in which accommodation is an inadequate measure to compensate for the impact of government action on religious interests.

Because the question of accommodation entails difficult questions and judgments regarding how to modulate government action, one would, in today's environment, be hesitant to say that accommodation is constitutionally required. The balance is, at least, normally close enough to neutrality that one would hesitate to conclude that the *general* unneutrality occasioned by various government actions requires a *specific* accommodation. Precisely because it entails this type of difficult factual judgment, it is natural to leave to the legislature, in the first instance, the task of designing accommodations. Yet, just as a court should be hesitant to require such accommodations as a matter of constitutional law, so the courts should be hesitant to strike down an accommodation, for there is nothing *in principle* constitutionally wrong with such measures. Thus, unless the accommodation clearly overreaches its purpose, it should bear a presumption of legitimacy.

B. Specific Implications Of The Neutrality Paradigm For The Public School Context.

In applying these principles to the instant case, it is clear that the moment of silence statute should receive consti-

tutional approval. For there is nothing unconstitutional about the intent to take religion into account, so long as the judgment as to how to do so is within the bounds of a reasonable accommodation. If, as the Circuit Court concluded, it is, then the statute itself must be constitutional. This assumes, of course, that the Circuit Court was correct on the substantive issue. To explain why we think that it was, it is necessary to consider briefly the issue of accommodation in the public school context.

The True Neutrality Paradigm discussed above does not lead by any process of strict logic to conclusions concerning the particular types of accommodation that should be acceptable in the public school context. Yet it does provide a frame of reference from which certain general boundaries can be deduced.

1. The Fallacy In The Traditional Analysis Turns On A False Equation Between Secular Public Schools And The Original Position.

The specific implications of the True Neutrality Paradigm are perhaps best developed by using the traditional analysis, which draws in part upon the older Separation Paradigm, as a point of departure. The traditional analysis includes the conclusions of the Separation Paradigm as a minor premise within a syllogistic argument which has as its major premise the notion that government should not advance religion. The minor premise, that things were in a truly neutral posture immediately prior to and apart from the addition of the particular accommodation or religious practice at issue in the case, then enters to set up the conclusion that the addition of the offending religious practice has disturbed the equilibrium and thereby advanced religion. To put it more crudely, the logic of this argument has it that (1) there was no religion in the schools before, (2) there is some religious practice now; (3) therefore, religion has been advanced by the addition of the practice or accommodation.

It is, of course, obvious from what has been said that the validity of the minor premise hinges completely on an equation between the current public school situation and the

original position. This equation is implicit in the assertion of the idea that "secular education can be isolated from all religious teaching." *Abington School District v. Schempp,* 374 U.S. 203, 218 (1963), quoting *Everson v. Board of Education,* 330 U.S. 1, 23-24 (1947) (Jackson, J., dissenting). For whether or not this statement is true,[16] it is irrelevant unless the ability to keep the public school secular can be equated with an original position of neutrality.

But this is obviously not the case. For the original position has reference to the point of complete voluntarism, to the state of parity in which government stays out of the affairs of religion and religion does not overreach its territory by extracting special dispensations from government. And the assumption by government of virtually plenary control over education completely vitiates that state of parity. This is not at all to say that such a move is unjustifiable but just to say that it must receive a justification in terms of the neutrality criterion.

Nor can it be argued that the assumption of governmental control over education does not touch upon traditional religious interests. For, on the contrary, education is traditionally the province of religious groups and private families. The transfer of this function from private hands to governmental control could not then occur without presumptively upsetting the original position of governmental neutrality toward religion in regard to education. How far it has been upset and what significance this has, are, of

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[16]This statement was perhaps more plausible at the time it was written, when there was (or appeared to be) more of a secular consensus about basic lifestyles and morality, than it is now, when radically different mores and worldviews closely associated with religion have made the public schools a focus for sectarian-based disputes over public school instruction. Because the public schools have such an important role in shaping the consciousness of young people, some have argued that they are inherently problematic from a constitutional standpoint. *See e.g.,* Arons and Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling,* 15 Harv. C.R.-C.L. L. Rev. 309, 316-17 (1980). It is clear that the public schools pose a potential threat to neutrality. Accommodations of various sorts, therefore, must be relied upon to defuse that unneutrality sufficiently to allay constitutional concerns.

course, separate questions. But it is at the very least not obvious that the difference is a trifling matter, if only because education is historically and functionally close to, if not a part of, the very lifeblood of the religious mission.

2. Accommodation Can And Must Play A Positive Role In The Theory Of Neutrality.

The question, then, is whether the character of governmental control of education can be managed in such a way as to bring within tolerable limits whatever unneutrality such control may entail. A comprehensive discussion of the methods by which this might be, or perhaps has been, accomplished is beyond the scope of the present argument. The existence of an option of private religious schooling, the possibilities for limited religious voluntarism under the 1984 Equal Access Law, the accommodation of released-time instruction approved by this Court in *Zorach v. Clauson,* 343 U.S. 306 (1952), and similar measures may help to obviate the problem. The difficulty, of course, is that the very efforts aimed at ameliorating hostility to, or suppression of, religious voluntarism simultaneously carry the potential to threaten neutrality from the standpoint of nonreligious or irreligious students. There may be no tidy answers to these problems.

It is, in any event, clear that efforts aimed at enhancing true neutrality through some sort of accommodation measure are not for that reason alone unconstitutional. In our opinion, the idea that accommodation can in principle play a positive role in the theory of neutrality is the most critical doctrinal point in controversy in the present case. Since we also concur with the Circuit Court as far as the essential substantive neutrality of a moment of silence, we conclude that the statute itself is constitutional.

V.

Conclusion

Accommodation of religious beliefs and practices has a central role in adapting the religion clauses to the breadth of governmental involvement in our modern welfare state. The

purpose to achieve the end of accommodation, as distinct from encouragement, of religious beliefs is beyond reproach as a constitutional matter. This Court should, therefore, reverse the decision of the Circuit Court below with respect to its views on secular purpose and uphold the constitutionality of the New Jersey statute.

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No. 85-1551

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In The
Supreme Court Of The United States

OCTOBER TERM, 1985

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, et al.,
Appellants

v.

JEFFREY MAY, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE, STATES OF CONNECTICUT, ARIZONA DELAWARE INDIANA, LOUISIANA, MICHIGAN, NEVADA AND NEW MEXICO

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

IN DECIDING THE CONSTITUTIONALITY OF A FACIALLY NEUTRAL MOMENT OF SILENCE STATUTE, INQUIRY INTO LEGISLATIVE MOTIVE SHOULD BE APPROPRIATELY DEFERENTIAL 3

CONCLUSION 6

TABLE OF AUTHORITIES

I. Cases: **Page(s)**

Clements v. Fashing, 457 U.S. 957 (1982) 5

Everson v. Board of Education, 330 U.S. 1 (1947) 5

Lemon v. Kurtzman, 403 U.S. 602 (1971) 3

May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *prob. juris. postponed*, 107 S.Ct. 946 (1987) 3, 4, 5

Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951) 5

Wallace v. Jaffree, 105 S.Ct. 2479 (1985) . . . . . *passim*

Walz v. Tax Commission, 397 U.S. 664 (1970) 3

Witters v. Washington Department For The Blind, 106 S.Ct. 748 (1986) 4

II. Statutes:

Conn. Gen. Stat. § 10-16a (1987) 1

III. Miscellaneous:

L. Tribe, *American Constitutional Law* (1978) 4

INTEREST OF AMICI

The State of Connecticut, like New Jersey and the other amici states, has a statute that requires each local or regional board of education to "provide opportunity at the start of each day to allow those students and teachers who wish to do so, the opportunity to observe such time in silent meditation." Conn. Gen. Stat. § 10-16a (1987). *See also Wallace v. Jaffree*, 105 S.Ct. 2479, 2498 & n.1 (1985) (O'Connor, J., concurring in the judgment) (listing the statutes). The United States Court of Appeals for the Third Circuit held that such a statute violates the Establishment Clause of the First Amendment, at least when the legislative history of the statute, read expansively, reveals a religious and not a secular purpose. While it may be possible to distinguish the legislative history of the moment of silence statute in Connecticut and other states from that in New Jersey, Connecticut and the other amici states nonetheless believe that the decision of the Court of Appeals, if not reversed, may affect the implementation of their laws. Since Connecticut and the other amici states have a desire, expressed in law, to maintain the practice of holding a moment of silence in their public schools, Connecticut and the other states, therefore, obviously have an interest in this case.

Our interest also stems from a broader consideration. The overly-intrusive inquiry into legislative motive sanctioned by the Court of Appeals in this case could, if upheld, cast doubt on any number of state statutes designed to accommodate, in a neutral fashion, religion and other personal factors into the stream of everyday public affairs. For that matter, the approach approved by the Court of Appeals might unfairly jeopardize statutes in other social and economic areas by exposing improper or discriminatory motives that do not accurately represent the intent of the legislature. The interest of Connecticut and the other amici states in this case is thus the concern that selective interpretation of legislative history may unnecessarily invalidate many important state statutes.

SUMMARY OF ARGUMENT

The issue in a case of this nature is no longer whether a moment of silence statute on its face is constitutional. In light of *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985), little serious dispute can exist that it is. The issue is rather whether evidence exists in the legislative history of the statute revealing that what on its face appears to be a neutral accommodation of religion and other concerns is in reality a pretext for the sole purpose of endorsing or establishing religion.

In analyzing this issue courts should not lightly conclude that a state legislative body has engaged in a game of subterfuge. A legitimate inquiry into motive should not become a quixotic search for purity. If it does, few statutes of this nature may survive.

ARGUMENT

IN DECIDING THE CONSTITUTIONALITY OF A FACIALLY NEUTRAL MOMENT OF SILENCE STATUTE, INQUIRY INTO LEGISLATIVE MOTIVE SHOULD BE APPROPRIATELY DEFERENTIAL.

1. Little serious dispute can now exist about the facial validity of a moment of silence statute that merely authorizes interested students to spend a moment of their school day in silent contemplation. This Court's majority opinion in *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985), made clear that "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." *Id.* at 2491. One member of the majority and all four other members of the Court authored separate opinions that went at least as far as to state that moment of silence statutes should survive facial constitutional attack. *Id.* at 2493 (Powell, J., concurring); *id.* at 2496–2501 (O'Connor, J., concurring in the judgment); *id.* at 2505 (Burger, C.J., dissenting); *id.* at 2508 (White, J., dissenting); *id.* (Rehnquist, J., dissenting). And even the Court of Appeals in this case conceded that "in the abstract a statute such as [New Jersey's moment of silence law] would not, in the opinion of the Supreme Court, be deemed invalid under the purpose leg of *Lemon v. Kurtzman*, [403 U.S. 602, 612–13 (1971).]." *May v. Cooperman*, 780 F.2d 240, 251 (3d Cir. 1985), *prob. juris postponed*, 107 S.Ct. 946 (1987).

This concensus merely recognizes that moment of silence statutes generally represent a permissible reconciliation of the tension between our right to the free exercise of religion and our prohibition on the establishment of religion. *See Walz v. Tax Commission*, 397 U.S. 664, 667–70 (1970). Surely few would contend that the government, consistent with the Free Exercise Clause, could categorically forbid students from praying silently on school grounds. The case is not significantly different when, as here, the government merely informs those

students that, if they wish to pray silently, they may do so at a designated time when other students may, if they wish, engage in silent nonreligious thought. As long as the government itself does nothing to favor those who wish to pray, the Establishment Clause is not offended, for the decision to pray stems not from the government's action but from "the genuinely independent and private choices" of the students. *Witters v. Washington Department for the Blind*, 106 S.Ct. 748, 752 (1986). *See also* L. Tribe, *American Constitutional Law* 829 (1978) (suggesting that even a statute requiring rather than permitting students to observe a moment of silence would not violate the Establishment Clause).

2. The real question in a case of this nature is thus whether credible evidence exists in the legislative history of a moment of silence statute that would undermine the statute's facial neutrality. *See Wallace v. Jaffree*, 105 S.Ct. at 2490–93. The mere presence, however, of some evidence of religious motive will not suffice. Only if the legislative history reveals the legislature to have been motivated "entirely" by religious concerns and to have had no secular purpose at all would a moment of silence statute run aground of the Establishment Clause. *Id.* at 2490. An Establishment Clause violation will arise, in other words, only if "the secular purpose articulated by the legislature is merely 'sham.' " *Witters v. Washington Department of Service for the Blind*, 106 S.Ct. at 751.*

Presumably a state legislature will not engage in a sham proceeding. Cases such as *Wallace v. Jaffree, supra*, in which the legislative history revealed unequivocally that the law represented solely an effort to return voluntary prayer to the schools, *id.* at 2490, form the exception rather than the rule.

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* We assume, as the Court of Appeals decided, that a moment of silence law will not have a primarily religious effect and will not foster excessive governmental entanglement with religion. *May v. Cooperman*, 780 F.2d at 247–50. Thus, the only real Establishment Clause issue is whether the statute has a secular purpose. *Lemon v. Kurtzman, supra.*

It seems fair to assume in the first instance that a legislature has acted in an honest and constitutional manner. *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion).

This assumption alone militates against the practice of conducting an overly-intrusive inquiry into legislative motive. Yet other, more practical reasons exist as well. An exhaustive search for evidence of a hidden legislative agenda, such as the search sanctioned by the Court of Appeals in this case, will seldom turn up empty-handed. No doubt that by crediting the testimony of witnesses present at legislative hearings, newspaper accounts of the hearings, evidence of the perceptions of citizens about the statute's purpose, and expert testimony about the statute's value—as the district court did in this case, *see May v. Cooperman*, 780 F.2d at 252 n.9; *id.* at 261 (Becker, J. dissenting)—a court can usually discover evidence of ulterior legislative motive. The same is true if a court looks indiscriminately at legislative floor debates. *See Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951). Few statutes in this controversial area can survive the test of absolute purity.

It is inappropriate to examine with a fine-toothed comb the wellsprings of legislative action. Courts are not equipped to do so, and the results are likely to be misleading. An inquiry into the purpose of the legislature in enacting a moment of silence law should accordingly be "deferential and limited." *Wallace v. Jaffree*, 105 S.Ct. at 2500 (O'Connor, J., concurring in the judgment). More generally, as well, in assessing whether any state statute has a proper public purpose courts must exercise "the most extreme caution." *Everson v. Board of Education*, 330 U.S. 1, 6 (1947).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
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RONALD and CATHERINE SOKALSKI
and TWYLLA FLANDERS,
Intervenors-Appellants

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO INTERVENE AS APPELLANTS AND BRIEF OF INTERVENORS-APPELLANTS RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

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50 P

TABLE OF AUTHORITIES

Cases Page

Beth Israel Hospital v. *NLRB*, 437 U.S. 483 (1978) v

Carey v. *Population Services International*, 431 U.S. 678 (1977) vii

Dimond v. *District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986) viii

Donaldson v. *United States*, 400 U.S. 517 (1971) vi

Eastern-Central Motor Carriers Assoc. v. *United States*, 321 U.S. 194 (1944) v

McDonald v. *E.J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970) viii

Meyer v. *Nebraska*, 262 U.S. 390 (1923) vii

Mullaney v. *Anderson*, 342 U.S. 415 (1952) v

Natural Resources Defense Council v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977) ..... vii, viii

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) vii

Trbovich v. *United Mine Workers of America*, 404 U.S. 528 (1972) viii

United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) vi

United States v. *Terminal Railroad Assoc.*, 236 U.S. 194 (1915) v

Statutes

42 U.S.C. § 1983 viii

Fed. R. Civ. P. 21 v

Fed. R. Civ. P. 24 v

Fed. R. Civ. P. 24(a) viii

Fed. R. Civ. P. 24(b) vi

N.J.S.A. 18A: 36-4 (West 1982) iv

Other Authorities

R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* (6th ed. 1986) v

7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 1908 (1986) ..... vi, vii, viii

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, *et al.*,
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and TWYLLA FLANDERS,
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v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO INTERVENE OF RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

Ronald and Catherine Sokalski, as natural parents and legal guardians of a minor child in the New Jersey public

school system, and Twylla Flanders, a teacher in the New Jersey public school system, move on behalf of themselves and others similarly situated for leave to intervene in this appeal to support the New Jersey moment of silence statute, N.J.S.A. 18A: 36-4 ("Section 36-4").

1. The Sokalskis reside in Little Falls, New Jersey, and their daughter, Lara, attends the fourth grade at the Little Falls Elementary School No. 1, a public school to which the statute is applicable.[1] App., *infra*, 1a, 3a.

The Sokalskis believe that a daily moment of silence at the outset of the school day, which would allow their daughter to meditate or pray or just relax, would be a positive and non-trivial element of their daughter's education. App., *infra*, 2a, 4a. Moreover, the Sokalskis believe that the New Jersey statute, which will permit their daughter's teachers to begin each day with a moment of silence, does not promote or establish religious practices in the schools. App., *infra*, 2a, 4a. On the contrary, the Sokalskis believe that the statute furthers individual liberty in a way that is religiously neutral. But more important, they are convinced that a moment of silence has a beneficial effect on the educational environment in which their daughter spends a considerable portion of her day. App., *infra*, 2a, 4a.

Twylla Flanders is a public school teacher at the Wandell Elementary School in Saddle River, New Jersey. App., *infra*, 5a. Mrs. Flanders believes that it is appropriate and educationally beneficial to begin the school day with a moment of silence. App., *infra*, 5a-6a. Although Mrs. Flanders in the past has used a moment of silence to open the school day, and has found it beneficial to the maintenance of a classroom atmosphere conducive to learning, she does not currently do so. App.,

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[1] For the Court's convenience, intervenors have printed their affidavits as an appendix to this filing. An original and copies of the affidavits also have been filed with the Clerk of the Court.

infra, 6a. In the absence of a valid state law authorizing her to use a moment of silence in the public schools, Mrs. Flanders is constrained from conducting a moment of silence by the threat of civil liability against herself and her school. App., *infra*, 6a.

Where the "interests of justice" so require, this Court clearly has authority to permit a party to intervene in the first instance in this Court. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* at 339-40 (6th ed., 1986); Fed. R. Civ. P. 24; *cf.* Fed. R. Civ. P. 21. Moreover, the Court has not infrequently permitted such intervention in the past. *See, e.g., Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978); *Eastern-Central Motor Carriers Assoc.* v. *United States*, 321 U.S. 194, 198 (1944); *United States* v. *Teriminal Railroad Assoc.*, 236 U.S. 194, 196 (1915). There is a compelling justification for intervention in this case because developments since the decision of the court of appeals have caused the issue of appellants' standing in this case to be placed in doubt. See 55 U.S.L.W. 3512 (January 27, 1987).

In an analogous situation in *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952), this Court granted a motion to add three new party plaintiffs to a case pending before the Court where the defendant had challenged, for the first time, the standing of the original plaintiffs. Relying on the joinder provisions in Rule 21 of the Federal Rules of Civil Procedure, the Court permitted the addition of new parties to "remove the matter [*i.e.*, the standing issue] from controversy" after finding that the addition "can in no wise embarrass the defendant" and would avoid the "needless waste" that would result from dismissing the case on the standing issue.

In the present case, appellants' standing became an issue only after the last election in New Jersey, which occurred after the court of appeals issued its opinion. See Letter from William W. Robertson, counsel for appellants to Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States (May 6, 1986). If the Court

were to hold now that appellants no longer have standing [2] and if the Court does not grant movants' request to intervene, then the decision below, which movants believe is erroneous, will be allowed to stand, and a state's statute beneficial to movants will become a nullity. In such a case, the injury to movants' interests is obvious. Movants are clearly the intended beneficiaries of the New Jersey statute and they will lose completely the benefit of that statute unless they are permitted now to assert their interest and defend the statute's constitutionality. Moreover, an issue of national significance will escape review by this Court because of a fortuitous coincidence of pleading and a change in the named appellants' legislative status. Accordingly, the Court should grant movants' leave to intervene to defend the statute.

2. Movants clearly meet the requirements of the three-part test for intervention of right in the federal courts.[3] See *Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971); see also 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 1908 at 262 (1986). First, they have a "significantly protectable interest" in the subject matter of the litigation. *Donaldson*, *supra*, 400 U.S. at 531. In this case, New Jersey has attempted

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[2] Appellants have informed movants that appellants will argue that they still have standing in this case. Movants, by seeking to intervene in order to "remove this matter from controversy," do not intend to cast any doubt on the validity of appellants' argument on this issue. Appellants, whose ultimate interest is to have the constitutionality of the State's statute resolved by this Court, have authorized us to inform the Court that they support this motion. Moreover, appellants have authorized us to inform the Court that they will consent to divided argument if the motion is granted.

[3] This same test is applicable while a case is pending in the district court and following entry of judgment. *See United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 387 and 395 n.16 (1977). If the court concludes that movants do not meet the requirements for intervention of right, we respectfully request that this court exercise its discretion to grant permissive intervention. *See* Fed. R. Civ. P. 24(b).

to accommodate the religious preferences of some families, such as the Sokalskis, without interfering with the religious liberty of others, such as appellees. The Sokalskis have a significant stake in protecting that state-conferred right. Moreover, the Sokalskis obviously have a significant interest in the education and upbringing of their daughter, an interest that is directly affected by the New Jersey moment of silence statute. Indeed, their interest in their child's education and development is an interest this Court has recognized as "fundamental." See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *Carey* v. *Population Services International*, 431 U.S. 678, 685 (1977). Similarly, movant Flanders, like many other teachers in New Jersey, has used the moment of silence as part of her teaching method and for pedagogical reasons would continue to do so but for the doubt created by the decision of the court below, holding the New Jersey statute unconstitutional, and the risk of a civil rights suit by persons like the appellees who believe any moment of silence unconstitutionally advances religion. Accordingly, movants' interest in this case is sufficient to support intervention.

Movants also meet the second requirement for intervention: the outcome of this litigation may impair or impede their expressed interest. See Wright, Miller and Kane, *supra* at 262, 305-312. As noted, movants strongly support the statute at issue in this case; as a "practical" matter,[4] this is movants' only opportunity to argue in support of the statute. The Sokalskis' state-conferred interest in having their religious preferences accommodated will be destroyed if this appeal is dismissed and the court of appeals' judgment of unconstitutionality left unreviewed. In addition, without the protection of a state law

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[4] *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (courts should look to "practical consequences" of denying intervention in determining whether outcome of litigation may impair or impede intervenors' interest).

providing for a moment of silence, few public school teachers in New Jersey, such as Mrs. Flanders, would be willing to risk potential liability under 42 U.S.C. § 1983 by beginning each day with a moment of silence.

Under the final element of the three-part test, movants should be allowed to intervene because they meet the "minimal" burden of showing that "representation of [their] interest *'may be' inadequate.*" *See Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). If this Court concludes that the present appellants lack standing, then the representation of movants' interests clearly will be inadequate.[5]

The final consideration is whether the motion to intervene is "timely." See Fed. R. Civ. P. 24(a). In determining whether intervention is appropriate, the passage of time is but one factor to be considered; the most important consideration is whether the delay has prejudiced the other parties. Wright, Miller and Kane, *supra* at 435; see also *McDonald* v. *E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). Appellees cannot claim any prejudice from the presence of intervenors in this litigation. This suit obviously was filed as a test case raising the fundamentally legal issue of the constitutionality of the New Jersey moment of silence statute and seeking to enjoin the moment of silence statewide. It was brought by many of the appellees in this Court on behalf of minor children in the public schools. The Sokalskis merely seek the same opportunity on behalf of their daughter to pre-

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[5] Obviously, the state appellants and movants will both argue that the statute in question is constitutional. but that is the extent of the identity of their interest. Appellants assert an institutional interest; movants have a direct and personal interest in the state statute. Courts often have noted that the government and private litigants do not share an identity of interest. *See Dimond* v. *District of Columbia*, 792 F.2d 179, 192-193 (D.C. Cir. 1986); *NRDC* v. *Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977).

sent their legal arguments in favor of the constitutionality of the statute and to assure that this Court has a clear Article III basis for rendering a decision on this issue.[6]

Respectfully submitted,

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[6] It is clear that movants could file a brief as *amici curiae*, and, if they did, appellees would be required to answer a 30 page brief. The only possible prejudice from granting intervention at this time would occur if movants filed a brief in excess of the 30 page limit for a brief as *amici curiae*. To avoid imposing any additional burden upon appellees, intervenors have limited their brief on the merits to 30 pages.

QUESTION PRESENTED

Whether a facially neutral statute permitting public school students to observe a one minute period of silence for quiet and private contemplation or introspection violates the Establishment Clause because one of its purposes is to permit prayer by those who want to pray.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	xi
TABLE OF AUTHORITIES	xiv
STATUS OF INTERVENORS-APPELLANTS	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	10
ARGUMENT	14
THE NEW JERSEY MOMENT OF SILENCE STATUTE, WHICH "PERMIT[S] STUDENTS TO OBSERVE A 1 MINUTE PERIOD OF SILENCE" FOR "PRIVATE CONTEMPLATION OR INTROSPECTION" DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT	14
I. The New Jersey Moment Of Silence Statute Has A Constitutionally Permissible Purpose And Does Not Convey Any Message Of Endorsement Or Disapproval Of Religion	14
II. The New Jersey Moment Of Silence Statute "Merely Protect[s] Every Student's Right To Engage In Voluntary Prayer During An Appropriate Moment Of Silence During The School Day" And Is A Constitutionally Permissible Accommodation Of Religion	21
CONCLUSION	27
APPENDIX	1a-6a

TABLE OF AUTHORITIES

Cases: Page

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 15, 16, 19, 23
Board of Education v. *Allen*, 392 U.S. 236 (1968) 14
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 16
Engel v. *Vitale*, 370 U.S. 421 (1962) 15
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 15
Everson v. *Board of Education*, 330 U.S. 1 (1947) 15
Gaines v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976) 3
Hobbie v. *Unemployment Appeals Commission*, No. 85-993 (Feb. 25, 1987) 12, 22
Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948) 21, 23
INS v. *Chadha*, 462 U.S. 919 (1983) 5
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 8, 14, 25
Lynch v. *Donnelly*, 465 U.S. 668 (1984) ..... *passim*
Marsh v. *Chambers*, 463 U.S. 783 (1983) 12, 21, 22, 25
Mueller v. *Allen*, 463 U.S. 388 (1983) 16
Stone v. *Graham*, 449 U.S. 39 (1980) (per curiam) 15
Estate of Thornton v. *Caldor, Inc.*, 105 S. Ct. 2914 (1985) 10
United States v. *Lovett*, 328 U.S. 303 (1946) 5
United States v. *O'Brien*, 391 U.S. 367 (1968) 17
Wallace v. *Jaffree*, 472 U.S. 38 (1985) ..... *passim*
Walz v. *Tax Commission*, 397 U.S. 664 (1970) 12, 22
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 12
Wooley v. *Maynard*, 430 U.S. 705 (1977) 13
Zorach v. *Clauson*, 343 U.S. 306 (1952) ..... *passim*

Constitutional Provisions and Statutes:

First Amendment 2
Fourteenth Amendment 2
28 U.S.C. § 1254(2) 2
42 U.S.C. § 1983 5
Alabama Code § 16-1-20.1 (Supp. 1984) 11
N.J.S.A. 18A: 36-4 (West 1982) ..... *passim*

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

Anticau, Downey and Roberts, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964) 23
The Bergen Record, December 14, 1982 4
Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329 (1963) 26
Comment, *Accommodating Religion in the Public Schools*, 56 Nebr. L. Rev. 425 (1980) 26
Comment, *Moment of Silence Statutes: An Improper Relationship Between Church and State in Public Schools*, 54 U.M.K.C. L. Rev. 488 (1986) 26
The *Courier-Post*, December 14, 1982 4
Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?*, 35 Rutgers L. Rev. 341 (1983) 26
Freund, *The Legal Issue In Religion and the Public Schools* (1965) 26
Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031 (1963) 26
McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1 ..... 13, 26
Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364 (1983) 26, 27
Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078 (1967) 26
Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983) 26
The Philadelphia Inquirer, October 19, 1982 3
Smith, *Now is the Time for Reflection: Wallace v. Jaffree and its Legislative Aftermath*, 37 Ala. L. Rev. 345 (1986) 26
The Star Ledger, October 25, 1982 ..... 3-4, 18

TABLE OF AUTHORITIES—Continued

	Page
The Star Ledger, December 2, 1982	4
The Star Ledger, December 14, 1982	4, 18
The Star Ledger, December 17, 1982	4
Treiman, *Religion in the Public Schools*, 9 N. Ky. L. Rev. 229 (1982)	26
The Trenton Times, October 12, 1982	3
The Trenton Times, October 19, 1982	3
The Trenton Times, December 3, 1982	4
The Trenton Times, December 14, 1982	4
Tribe, *American Constitutional Law*, § 14-6 (1978)	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, *et al.*,
Appellants,

RONALD and CATHERINE SOKALSKI
and TWYLLA FLANDERS,
Intervenors-Appellants

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF OF INTERVENORS-APPELLANTS RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

STATUS OF INTERVENORS-APPELLANTS

Contemporaneously with the filing of this brief, intervenors-appellants have filed a motion for leave to intervene with supporting affidavits and legal argument.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-61a) is reported at 780 F.2d 240 (3d Cir. 1985). The opinion of the district court (J.S. App. 62a-100a) is reported at 572 F. Supp. 1561 (1983).

JURISDICTION

The judgment of the court of appeals (J.S. App. 103a) was entered on December 24, 1985. The Jurisdictional Statement was filed March 19, 1986. On January 12, 1987, the Court granted review of the appeal, but postponed ruling on the question of jurisdiction pending a hearing on the merits. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

N.J.S.A. 18A: 36-4 (West 1982) provides:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT

1. The New Jersey Moment of Silence Statute, Assembly Bill 1064, described by its 55 sponsors as "[a]n Act to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day" (J.S. App. 110a), was introduced in the New Jersey Assembly on March 8, 1982. The explanatory statement attached to the bill provided simply that the

provision "allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student." J.S. App. 111a.

Following its introduction, the bill was referred to the Education Committees of the Senate and Assembly which filed reports stating—in language virtually identical to the statute itself—that the measure "permit[s] students to observe one minute of silence before the opening exercises of each school day" to be "used solely at the discretion of the individual student for quiet contemplation or introspection." J.S. App. 13a. The legislative reports added that the bill was based upon a Massachusetts statute that had been upheld against a challenge under the Establishment Clause of the First Amendment. J.S. App. 14a; see *Gaines* v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three-judge district court).

Although the New Jersey Legislature does not preserve transcripts of committee hearings or floor debates (J.S. App. 14a), the legislative discussion surrounding the bill attracted considerable media attention. Several remarks reported in the press reflected the desire of a few individual legislators to accommodate some students' interests in voluntary prayer in the public schools.[1] The press reports, however, also included statements of "several legislators" that "the bill had nothing to do with prayer."[2]

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[1] *See, e.g.*, Ernest Tollerson, *The Philadelphia Inquirer*, October 19, 1982 (quoting Senate President Carmen Orechio) ("'[m]ost of our youngsters are well meaning, are disciplined, don't cause problems for society in general, but I think if we had more prayer, more religion, a lot of the problems that are brought to us by our youngsters would be eliminated and avoided'"); Jim Goodman, *The Trenton Times*, October 12, 1982 (quoting Senator Francis McManimon). Appellees provided these newspaper excerpts to the court of appeals in a letter brief filed with the court following oral argument. Appellees' Letter Brief, *May* v. *Cooperman*, Nos. 83-5890 and 84-5126 (3d Cir., Aug. 29, 1985) 2 (hereafter cited as "Appellees' Letter Brief").

[2] Jim Goodman, *The Trenton Times*, October 19, 1982. *See, e.g.*, Robert G. Seidenstein, *The Star Ledger*, October 25, 1982

The bill was passed by both houses of the State legislature, but was vetoed in early December by Governor Thomas Kean. That veto was overridden by the respective votes of the Assembly on December 13, 1982 and the Senate on December 16, 1982. Press reports reflect that the measure was enacted over the governor's veto at least in part to "help restore order in the classroom." [3] The bill became effective immediately, shortly before the 1982 Christmas school recess. N.J.S.A. 18A: 36-4 (West 1982).[4]

2. On January 19, 1983, appellees, a group of parents, students and a teacher opposed to implementation of a moment of silence in the public schools, commenced this litigation seeking declaratory and injunctive relief against the Commissioner of the New Jersey Department of Edu-

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(quoting Assemblyman James Zangari, principal sponsor of the bill) ("'[R]egardless of what some people say, this is not a prayer bill. Rather, it would allow each student to participate in a one-minute period of voluntary silence to be used at his or her discretion'"); Robert G. Seidenstein, *The Star Ledger*, December 2, 1982 (quoting Assemblyman Zangari). Appellants provided these newspaper excerpts to the court of appeals in a letter brief filed with the court following oral argument. Appellant's Letter Brief, *May* v. *Cooperman*, Nos. 83-5890, 84-5126 (3d Cir., Aug. 19, 1985) 4-5 (hereafter cited as "Appellant's Letter Brief").

[3] Robert G. Seidenstein, *The Star Ledger*, December 14, 1982 ("Assemblywoman Angela Perun (D-Union) said the bill would help restore order in the classroom, adding, 'we need all the discipline we can muster in the schools' . . . Assemblyman John Rocco (R-Camden) argued that the bill did not touch on religion but simply permitted teachers and students 'to spend some moments in reflection'"). Appellant's Letter Brief 1. *See also* Jim Goodman, *The Trenton Times*, December 14, 1982; John Shure, *The Bergen Record*, December 14, 1982; Nancy Freiberg, *The Courier-Post*, December 14, 1982; Robert G. Seidenstein, *The Star Ledger*, December 17, 1982; Jill Pollack, *The Trenton Times*, December 3, 1982. Appellant's Letter Brief 3-5.

[4] The text of the statute was communicated to all school districts by the New Jersey Department of Education without administrative guidelines or comment. J.S. App. 8a.

cation, the Department itself, the Edison Township Board of Education and the Old Bridge Township Board of Education. The action was founded upon 42 U.S.C. § 1983 and sought declaratory and injunctive relief. Appellees asserted, among other things, that the statute violated the Establishment Clause of the First Amendment. J.S. App. 4a.[5] On the day the complaint was filed, the district court issued a temporary restraining order enjoining observance of a moment of silence pursuant to the statute. *Id.* at 5a. When it became apparent that the Executive Branch would not defend the provision, the district court permitted the New Jersey legislature to intervene to defend the constitutionality of the moment of silence statute.[6] Thereafter, the parties consented to an order enjoining the exercise of rights under the statute pending trial on the merits. *Id.* at 6a.

Trial commenced on September 13, 1983. Appellees' evidence fell into five categories: "testimony of three witnesses who were present at legislative hearings; newspaper accounts of the hearings; evidence of the perceptions of various citizens and citizens' groups of New Jersey about the statute's purpose; expert testimony about the pedagogical value of the statute; and [numerous] prior bills proposing moments of prayer or moments of silence." J.S. App. 48a (Becker, J., dissenting).

In an attempt to establish that the purpose for the moment of silence statute was religious in nature, three

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[5] Appellees also argued that the statute violated the Due Process Clause of the Fourteenth Amendment as well as the New Jersey Constitution. Neither the district court nor the court of appeals addressed these claims.

[6] The district court permitted the New Jersey Senate, the New Jersey General Assembly and the respective President and Speaker for those two legislative bodies to intervene. J.S. App. 5a. Compare the procedures followed in *INS* v. *Chadha*, 462 U.S. 919 (1983), and *United States* v. *Lovett*, 328 U.S. 303 (1946).

witnesses testified that some legislators wanted to accommodate voluntary prayer.[7] The witnesses also "testified to legislators' statements that the statute had a secular purpose." *Id.* at 48a-49a (Becker, J., dissenting).[8] Newspaper clippings also demonstrated that secular as well as religious concerns animated the actions of individual legislators. See *supra* notes 1-3 and accompanying text.

Appellees' witnesses opined as to how Section 36-4 was perceived by various organizations, such as the New Jersey School Board Association, the American Baptist Churches of New Jersey, and the public. J.S. App. 71a-73a. They characterized the statute "as an attempt to return prayer to the public schools in another guise." *Id.* at 71a.

On the question of the pedagogical value of the statute, the district court heard appellees' expert testimony "that

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[7] Typical of the testimony relied upon by appellees is the following statement by Reverend Sarfaty (Appellee's Letter Brief 9):

> Question: How about Senator Brian Kennedy? Do you have any recollection of any statements made by Senator Kennedy?
>
> Answer: Yes, I do, because I got to know him pretty well, especially in debates over the subject away from the Assembly or the Senate.
>
> He said that: Nobody knows what the kids are doing, but he hopes they are praying.

[8] Miss Rhodes, for example, testified that she recalled a statement by Assemblyman Zangari "that the intent [of the statute] was basically to provide the minute of silence at the beginning of the school days." Appellants' Letter Brief 6. Mr. Chuman, in a fairly lengthy exchange set out by Judge Becker (J.S. App. 49a n. 7), testified that Assemblyman Zangari had stated that "he thought that the moment of silence would be useful in the schools and would serve an educational purpose." Appellants' Letter Brief 8. Reverend Sarfaty further recalled that "the debate was: Did we need this thing to change the climate and life of our school system? The majority of the Senators felt we did. As far as I could see, they really didn't think any prayer issue was relevant one way or another so long as it had this effect." *Id.* at 9-10.

the moment of silence before class would not be a valuable educational tool." J.S. App. 56a (Becker, J., dissenting); see J.S. App. 83a-84a (moment of silence "has little educational justification"). Appellants' experts, by contrast, testified "that the minute of silence served a useful pedagogical function by creating a boundary between school and non-school time" which was important "because it would emphasize to the students the importance of the school hours, and the fact that school hours were a time for serious work rather than undisciplined play." *Id.* at 56a (Becker, J., dissenting). In addition, appellants introduced testimony by educators who had extensive favorable experience with a local moment of silence policy.[9]

The final category of evidence considered by the district court consisted of prior prayer and/or moment of silence bills debated by the New Jersey legislature. The evidence reflected several attempts during the 1970s to enact a law providing for school prayer, none of which

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[9] Appellants introduced evidence that the Sayreville (New Jersey) Board of Education adopted a moment of silence policy in 1969. J.S. App. 73a. Since that time, "all the Sayreville public schools have commenced the day with opening exercises which culminated in a moment of silence." *Id.* A teacher who had administered the moment of silence for an extended period testified that "[n]o parents or children ever expressed concern about the practice, and [she] viewed the ceremony as a helpful way to start the school day." *Id.* at 74a.

Appellants also submitted the results of a study in the Las Cruces, New Mexico Public School District by Dr. Calvin Thompson, who testified at trial. Dr. Thompson studied the effect of a moment of silence "by televising a number of classrooms before, during and after the moment of silence, by watching the period of silence and by conducting structured interviews with students. On the basis of his study Dr. Thompson concluded that most persons viewed the moment of silence as simply silence and not as prayer." J.S. App. 79a.

succeeded in becoming law.[10] Subsequently, the legislature shifted to the concept of a moment of silence which was enacted in 1982.[11]

The district court, on the basis of the above record, concluded that the moment of silence statute violated all three prongs of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The court reasoned that the moment of silence provision failed the "purpose" prong of *Lemon* because the secular motivation behind the statute was not "overwhelming[ly] obvious and important" (J.S. App. 91a). Despite finding that "in combination with the flag salute and a song a brief period of silence serves a transition purpose" (*id.* at 83a), the court held that the "purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill." *Id.* at 87a. Because the trial court found that the "purpose of [the statute] was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer" (*id.* at 86a), it determined that the statute violated the "effect" prong of *Lemon* by

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[10] The evidence showed that on three occasions, bills were introduced that would have provided for voluntary recitation of the Lord's Prayer. S.B. 1296 (1976 session); S.B. 472 (1978 session); S.B. 594 (1980 session). None of these prayer measures was enacted. In 1968-1970, the legislature did pass bills that would have mandated a "brief period of silent prayer or meditation," but these measures were vetoed by the governor. A.B. 640 (1968); A.B. 146 (1969); A.B. 597 (1970). In 1980 and 1981, several bills were introduced that did not refer to prayer but instead provided for mandatory participation in a moment of silence in the classroom; one of these moment of silence bills was enacted in 1981 but was vetoed by the governor. A.B. 1028 (1980); A.B. 342 (1980); A.B. 2197 (1981).

As noted, *supra* p. 4, Section 36-4, the voluntary moment of silence statute at issue in this case was passed by the New Jersey legislature in 1982.

[11] Compare S.B. 1296 (1976 session); S.B. 472 (1978 session); S.B. 594 (1980 session) with Section 36-4.

both "advanc[ing] and inhibit[ing] religion." *Id.* at 94a. Finally, the moment of silence was found to be unduly "entangling" because a "required minute of silence would pit children and parents who believed in prayer in the public schools against children and parents who do not." *Id.* at 98a.

The court of appeals, by a divided vote, affirmed. The court disagreed, however, with virtually all of the district court's reasoning. The court of appeals repudiated the assertion that the statute was unconstitutionally "entangling" because of its potential for divisiveness. *Id.* at 17a (citing *Lynch* v. *Donnelly*, 465 U.S. 668, 684 (1984)). The court of appeals noted that, "[i]f political divisiveness were the test for entanglement, no governmental accommodation of religion would survive Establishment Clause scrutiny. The law is otherwise." J.S. App. 17a. The court then rejected the holding below that the statute violated the "effect" test simply "by designating a time and place when children and teachers may pray." *Id.* at 22a. "The state," the court of appeals wrote, "equally injects itself into religious matters when it designates a time and place when children and teachers may not pray." *Id.* The court of appeals, however, held that the moment of silence statute foundered upon the "purpose" prong of *Lemon*.

The court declined to set aside the district court's finding that the statute's purported secular purpose was "pretextual." J.S. App. 27a. The court of appeals nevertheless considered whether the statute survived constitutional scrutiny as a permissible accommodation of religious beliefs. Noting that there was no basis for finding that "teachers had encouraged voluntary prayer over other alternative uses of the minute of silence" (*id.* at 26a), the court concluded that a holding that the purpose of the statute "was to encourage prayer over other alternatives . . . would [not] be sustainable" (*id.* at 29a). Thus, the court reasoned that "the question pre-

sented by this appeal narrows to this: May the state . . . take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray?" *Id.* Finding no "clear answer" from the opinions in this Court's recent decision in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), the court gave a negative response—virtually without explanation. J.S. App. 29a.[12]

Judge Becker filed a lengthy dissent. "[T]he panel has concluded that the statute has no impermissible effect and fosters no excessive governmental entanglement with religion. As I see it, under these circumstances, only extremely clear proof that the law is devoid of a secular purpose would justify our holding it unconstitutional; such proof was not produced in this case." J.S. App. 32a (Becker, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

Two years ago this Court invalidated a unique state statute which authorized a period of silence for "meditation or voluntary prayer." *Wallace* v. *Jaffree*, 472 U.S. 38, 40 (1985). The Court did so, however, only because Alabama's statute "had *no* secular purpose" (*id.* at 56) (emphasis in original), as evidenced by the unambiguous declarations of its legislative sponsor[13] and the existence of another facially neutral moment of silence provision

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[12] The court of appeals did note (J.S. App. 29a) that this Court had invalidated a "statute that was designed to accommodate religious views" in *Estate of Thornton* v. *Caldor, Inc.*, 105 S. Ct. 2914 (1985), but ignored the fact that the decision in *Thornton* was based on the "effects" prong of the *Lemon* test—which the court of appeals already had concluded was satisfied here. J.S. App. 17a-22a.

[13] The principal legislative sponsor of the Alabama statute, when asked "whether he had any purpose for the legislation other than returning voluntary prayer to public schools . . . stated, 'No, I did not have no other purpose in mind.'" 472 U.S. at 57.

already in effect in the State.[14] *Id.* at 56-59. Under those circumstances, the Court concluded that the statute was constitutionally infirm because it was "enacted to convey a message of State endorsement and promotion of prayer." *Id.* at 59. But, a majority of the Court indicated that a moment of silence statute that did not endorse prayer would withstand scrutiny under the Establishment Clause. See *id.* at 62 & n.2 (Powell, J., concurring); *id.* at 72-73, 76-77 (O'Connor, J., concurring); *id.* at 87-89 & n.4 (Burger, C.J., dissenting); *id.* at 90-91 (White, J., dissenting); *id.* at 113-114 (Rehnquist, J., dissenting). The court of appeals here specifically held that the New Jersey moment of silence statute does not "encourage prayer over other alternatives." J.S. App. 29a. Accordingly, the statute should have been upheld.

1. The New Jersey moment of silence statute satisfies all three prongs of the *Lemon* test. With respect to effects and entanglement, the court of appeals was correct that the moment of silence statute in New Jersey clearly passes constitutional muster. Student silence has no religious effect—primary, secondary or otherwise. Neither is there any entanglement. The crucial inquiry, then, is whether the statute has any legitimate secular purpose, and on this issue the court of appeals has misread this Court's precedents, particularly *Wallace* v. *Jaffree*. As noted above, a majority of the Court in that case (and perhaps the entire Court) said that properly drawn moment of silence statutes ordinarily should be constitutional. It would be difficult to imagine a statute whose

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[14] The statute invalidated in *Jaffree* (Alabama Code § 16-1-20.1 (Supp. 1984)) was enacted despite the presence in the Alabama Code of an earlier, facially neutral moment of silence provision. Alabama Code § 16-1-20 (Supp. 1984). Because Alabama could not "identif[y] any secular purpose [furthered by the second statute] that was not fully served" by the earlier legislation, the Court concluded that the second moment of silence provision "was intended to convey a message of State-approval of prayer activities in the public schools." 472 U.S. at 59, 61.

language and history are any freer of improper purpose than this one.

The New Jersey statute also lacks any other indicia of an improper legislative purpose to promote religion. Legislators advocated enactment of the statute on the basis of the secular purpose to restore order to the classroom. Moreover, the relationship between the moment of silence statute and prior proposed legislation demonstrated that the state would not approve any efforts to compel school prayer. Thus, enactment of a moment of silence did not convey any intention to force prayer into the schools. Accordingly, the court of appeals erred in holding that the statute violates the First Amendment because of the supposed lack of an appropriately "secular" purpose.

2. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Commission*, No. 85-993 (February 25, 1987), Slip op. 8 (footnote omitted). Legislative choice is not limited to what is required by the dictates of the Free Exercise Clause. *Id.* at 8 & n.10. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 791 (1983); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Thus, even if the purpose of Section 36-4 were to "promote religion" by accommodating some children's desire to have an opportunity to pray, that purpose could still be legitimate under the Establishment Clause.

Such accommodation, of course, is bounded by the Establishment Clause principles of *neutrality* (the state must not favor one religion over another, or communicate a message of endorsement of a particular religious practice) and *voluntarism* (the state may facilitate only religious choices that are independently adopted and may

not induce religious exercise). The appropriate distinction, then, is between the genuine desire to accommodate religious needs and the desire to use the resources and prestige of government to encourage or inculcate religion among the unwilling or the indifferent. See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

Here, to the extent the moment of silence statute accommodates religion, the accommodation is clearly permissible under this Court's precedents. The New Jersey statute is purely enabling, not prescriptive. It is silent as to religion, protecting " 'both the right to speak freely and the right to refrain from speaking at all.' " *Jaffree*, 472 U.S. at 51 (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977)). It is plainly not " an instrument for fostering public adherence to an ideological point of view [an individual] finds unacceptable.' " *Id.* at 51-52. At most, it provides a limited opportunity for those few children who wish to do so to pray prior to the beginning of the school day. The New Jersey moment of silence statute, simply put, is constitutionally unexcepticnable and should be upheld as a permissible accommodation of religion.

ARGUMENT

THE NEW JERSEY MOMENT OF SILENCE STATUTE, WHICH "PERMIT[S] STUDENTS TO OBSERVE A 1 MINUTE PERIOD OF SILENCE" FOR "PRIVATE CONTEMPLATION OR INTROSPECTION" DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

I. The New Jersey Moment Of Silence Statute Has A Constitutionally Permissible Purpose And Does Not Convey Any Message Of Endorsement Or Disapproval Of Religion.

The district court concluded that the New Jersey statute violated all three prongs of the *Lemon* test. J.S. App. 94a, 98a. The court of appeals correctly disagreed with the conclusion that the statute ran afoul of the "entanglement" or "effect" elements. *Id.* at 16a-22a. As the court of appeals found, a moment of silence statute does not foster excessive entanglement with religion or have the primary effect of advancing or inhibiting reliigon. *Lemon*, 403 U.S. at 612-613; *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968). A moment of silence, moreover, does not create the danger that the state or the church will intrude upon the affairs of the other, nor can it have the "effect on the minds and feelings of immature pupils" of advancing religion for the obvious reason that "it is unlikely that many children [will] use a simple 'moment of silence' as a time for religious prayer." *Jaffree*, 472 U.S. at 66 n.9 (Powell, J., concurring). *See also id.* at 72 (O'Connor, J., concurring).

The court of appeals nevertheless affirmed the district court's holding that the statute was unconstitutional. It did so, however, on the ground that it did not find "clearly erroneous" (*id.* at 27a) the lower court's conclusion that the statute lacked an "overwhelming[ly] obvious and important secular purpose." *Id.* at 91a. The affirmance on this ground reflects a fundamental mis-

understanding of the inquiry into legislative purpose under *Lemon*.

"The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680 (emphasis added) (citing *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam); *Epperson* v. *Arkansas*, 393 U.S. 97, 107-109 (1968); *Abington School District* v. *Schempp*, 374 U.S. 203, 223-224 (1963); *Engel* v. *Vitale*, 370 U.S. 421, 424-425 (1962)). A statute need have only "*a* secular purpose;" there is no requirement that it have " 'exclusively secular' objectives." *Lynch*, 465 U.S. at 681 n.6 (emphasis added). Moreover, the judicial search for that secular purpose "should be deferential and limited." *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring).[15] "If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 74-75. The lower courts' rejection of the New Jersey legislature's proffered secular purpose for the statute in the course of their search for an "overwhelming[ly] obvious and important secular purpose" (J.S. App. at 91a) was clearly erroneous.

The question whether a state statute has a secular purpose "cannot be answered in the abstract, but instead requires courts to examine the history, language and administration of a particular statute to determine whether it operates as an endorsement of religion." *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring). A balanced analysis of the language, history and administration of the

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[15] *See Everson* v. *Board of Education*, 330 U.S. 1, 6 (1947) (court should exercise "the most extreme caution" in assessing whether a state statute has a proper purpose).

moment of silence statute in this case reveals a legitimate secular basis for the statute.[16]

"[A] plausible secular purpose for the State's [moment of silence] program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388 at 394-395 (1983). The statute provides for a moment of silence, "before the opening exercises of each school day," to be used in the individual student's discretion "for quiet and private contemplation or introspection." Such a moment of contemplation serves the "solely secular ends" of "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). Indeed, the appellants introduced an expert witness and two educators from Sayreville, New Jersey, who testified that a moment of introspection before the start of a school day serves an important pedagogical function—it creates a boundary emphasizing "that school hours [are] a time for serious work rather than undisciplined play." J.S. App. 56a (Becker, J., dissenting). See *supra* notes 3, 8 & 9 and accompanying text.[17] Moreover, even the dis-

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[16] Appellant Karcher has argued that this Court "is required to independently review the entire trial court record in order to preserve the liberties established by the United States Constitution." Jurisdictional Statement at 26 (citing *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984). *See* J.S. App. 43a-47a (Becker, J., dissenting) (arguing that *Bose* requires plenary review of record in this case). Although intervenors-appellants agree with appellant Karcher that the presence or absence of a "secular purpose" is a "constitutional fact" falling within the *Bose* standard, the Court need not resolve whether *Bose* applies to this case. The record here "simply does not demonstrate that the statute lacks any secular purpose." *Id.* at 59a (Becker, J., dissenting).

[17] The fact that appellees' witnesses disputed the pedagogical wisdom of a moment of silence is not constitutionally significant. *See* J.S. App. 83a-84a. "This program may be unwise and improvident from an educational or a community viewpoint. . . . [I]ndividual preferences, however, are not the constitutional standard." *Zorach*, 343 U.S. at 314. The New Jersey legislature has articulated a legitimate, secular purpose for its moment of silence

trict court acknowledged that "a brief period of silence serves a transition purpose." *Id.* at 83a. Accordingly, the court's ultimate conclusion that the statute nevertheless lacks a "secular purpose" is plainly wrong.

The district court compounded that error by concluding that the legislative history of the statute and its relationship to prior New Jersey prayer or contemplation statutes evidence an impermissible sectarian purpose. The legislative statement attached to the statute, as well as the legislative reports on the measure, reflect a secular goal: provision of a moment of silence "for quiet contemplation or introspection." J.S. App. 13a. Nothing outside these materials, moreover, demonstrates an impermissible legislative motivation.[18]

Appellees' witnesses testified that, during the legislative hearings on the statute, there were some individual legislators who expressed their desire to accommodate private, voluntary prayer. *Supra* note 7 and accompanying text. But this evidence, "given its paucity," was "at best underwhelming." J.S. App. 48a (Becker, J., dissenting). Moreover, as we argue in Part II, *infra*, this stated purpose is clearly legitimate. More important, however, appellees' witnesses admitted that the legislators articulated unquestionably legitimate secular purposes for the

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statute. The lower courts erred in striking down the statute based on testimony that the wisdom of that goal is debatable. *See* J.S. App. 83a-84a.

[18] Appellant Karcher has argued that searching judicial inquiry into the motivation of the New Jersey legislature is improper. *See* Jurisdictional Statement at 13-21. *See* also *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter"). Intervenors-appellants share appellant Karcher's legitimate objection to exacting judicial scrutiny of legislative motivation. Nevertheless, the evidence of legislative intent considered below (consisting mainly of eyewitness accounts of the legislative hearings and newspaper articles) plainly shows a legitimate secular purpose for the statute. *Supra* notes 2, 3 & 8 and accompanying text. The "legislative purpose" inquiry of *Lemon* demands no more.

legislation. *Supra* note 8 and accompanying text. The press coverage of the legislative process likewise evidences a secular goal on the part of the New Jersey legislature. Despite some reported references to prayer (*supra* note 1 and accompanying text), the newspaper articles introduced by appellees reflect that the statute was enacted to "provide [students] with a chance to acquire perspective" [19] and to "help restore order in the classroom." [20] *Supra* notes 2-3 and accompanying text. There is simply no basis for the lower court's pronouncement that the "statute had *no* secular purpose." *Jaffree*, 472 U.S. at 56.

The lower courts' rule—and the only rule under which an impermissible purpose can be ascribed to the statute—would invalidate *any* statutory accommodation of religion whenever *any* legislator made *any* comment in favor of religion. Such an approach would represent not an application of *Lemon*, but its replacement with a rule of *per se* invalidity for moment of silence statutes and other religious accommodations. It would also create a single-legislator veto power in any legislative opponent of such legislation. Such a result is improper. *Cf. Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring) (it is "disingenuous to look for a purely secular purpose" in a religious accommodation statute; "the Court should simply acknowledge that the religious purpose of [an accommodation] statute is legitimated by the Free Exercise Clause").

Nor is this a case, like *Jaffree*, where the relationship between the statute and prior legislative efforts demonstrates the "wholly religious character" of the moment of silence provisions. *Jaffree*, 472 U.S. at 58. Unlike the "Lord's Prayer" bills and the "prayer or meditation"

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[19] Robert G. Seidenstein, *The Star Ledger*, October 25, 1982 (Appellants' Letter Brief 5).

[20] Robert G. Seidenstein, *The Star Ledger*, December 14, 1982 (Appellants' Letter Brief 2).

provisions introduced into the New Jersey legislature at various times, the moment of silence statute makes no reference whatsoever to prayer. *Supra* note 10 and accompanying text. And, unlike all the prior statutes —which made participation by "all pupils" mandatory (J.S. App. 10a; see *id.* at 11a-13a)—the moment of silence statute merely "permit[s] students to observe a 1 minute period of silence to be used solely at the discretion of the individual student." Thus, any rational consideration of the relationship between prior New Jersey prayer or contemplation statutes and Section 36-4 can yield but one conclusion: the state legislature, over time, became increasingly sensitive to Establishment Clause concerns. It rejected attempts to return mandatory prayer to public classrooms (*cf. Jaffree*, 472 U.S. at 57-61), but approved a completely discretionary "contemplation or introspection" provision. While it is true that rights of conscience will bear but the " 'gentlest touch of governmental hand,' "[21] New Jersey has conscientiously kept its touch within constitutional limits.

Because the appellees filed this action almost immediately after Section 36-4 went into effect, there is virtually no evidence in the record concerning the administration of the statute. J.S. App. 8a. What evidence there is, however, shows that moments of silence have been administered in New Jersey without creating any Establishment Clause problems. Two educators testified that they had used a moment of silence since 1969 without any child or parent complaining that the practice promoted religion. Moreover, these educators found that the opportunity for introspection was "a helpful way to start the school day." J.S. App. 74a. This evidence negates any serious claim that the secular purpose for Section 36-4 is "pretextual." J.S. App. 27a.

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[21] *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) (quoting 1 Annals of Cong. 730 (J. Hales ed. 1789)).

The evidence in this case plainly shows that the New Jersey legislature was motivated by a proper secular purpose when it enacted the moment of silence statute. There is, in fact, no reliable evidence to the contrary.[22]

This Court has indicated that the fundamental inquiry under the "purpose" prong of *Lemon* is " 'whether the Government intends to convey a message of endorsement or disapproval of religion.' " *Jaffree*, 472 U.S. at 61 (quoting *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring)). In the context of a moment of silence statute, the "crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring). Even a cursory review of the record below demonstrates that the New Jersey legislature plainly did not convey or attempt to convey any such message when it enacted the moment of silence statute. Indeed, the court of appeals expressly found that the State of New Jersey has not "encourage[d] prayer over other alternatives." J.S. App. 29a. As a result, the State's provision of a moment of silence for schoolchildren and teachers at the start of each school day does not exceed the strictures of the Establishment Clause.

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[22] Although the district court thought it "significant" that appellees' witnesses characterized the statute as "an attempt to return prayer to the public schools in another guise" (J.S. App. 71a), such "[c]ommunity perception is simply too amorphous and unreliable to provide the ground for constitutional decisions." *Id.* at 55a (Becker, J., dissenting). Indeed, Justice O'Connor has stated that federal courts must not "denigrate an expressed secular purpose" based on "testimony . . . by interested persons who witnessed the drafting of the statute." *Jaffree*, 472 U.S. at 75.

II. The New Jersey Moment Of Silence Statute "Merely Protect[s] Every Student's Right To Engage In Voluntary Prayer During An Appropriate Moment Of Silence During The School Day"[23] And Is A Constitutionally Permissible Accommodation Of Religion

Even assuming that Section 36-4 could be regarded as having some "non-secular" purpose, the court of appeals was clearly correct that such a finding does not end the inquiry because all efforts at accommodation of religion have in some sense a non-secular purpose. *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). The issue remains whether the statute nevertheless could be sustained as a permissible "accommodat[ion] [of] those students desiring the opportunity to engage in prayer at some point during the school day." J.S. App. 28a. Finding no unambiguous guidance in the previous decisions of this Court, the court of appeals concluded that a state may not "provide[] for a minute of silence for the purpose of permitting prayer by those who want to pray" even where the state does not "endors[e] prayer in preference to other forms of silent activity." *Id.* at 29a. The Establishment Clause does not require such an extreme result.

"In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch*, 465 U.S. at 678. The fundamental goal of the Religion Clauses of the First Amendment is not the removal of all traces of religion from public life. On the contrary, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Id.* at 673. See *Marsh* v. *Chambers*, 463 U.S. 783, 791 (1983); *Zorach*, 343 U.S. at 314-315; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948). By providing its schoolchildren with

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[23] *Jaffree*, 472 U.S. at 59.

the opportunity for voluntary, private introspection at the start of each school day, the State of New Jersey has not transgressed constitutional limits. Rather, by "adjusting the schedule of public events to sectarian needs," it has "follow[ed] the best of our traditions." *Zorach*, 343 U.S. at 314.

The statute permits schoolchildren and teachers, at their discretion, to take a moment for purely voluntary and private meditation, contemplation or devotion. Ronald and Catherine Sokalski, intervenors-appellants here and parents of a child attending a New Jersey public school, reasonably believe that a moment of silence would be a positive and non-trivial element of their daughter's education during which she might take advantage of the opportunity to say a brief prayer before she begins her day in school. App., *infra*, 1a, 3a. Although the state may be under no constitutional command to provide such a moment,[24] its provision in the context of a public school —a structured, compulsory state institution where contemplative opportunities are limited—necessarily furthers values protected by the Free Exercise Clause. "[E]ven when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh* v. *Chambers*, 463 U.S. 783, 812 (Brennan, J., dissenting). See *Hobbie* v. *Unemployment Appeals Commission*, No. 85-993 (Feb. 25, 1987), slip op. 8. The Court has repeatedly stated that there is a channel —within which state legislatures and Congress may safely navigate—between what the Establishment Clause prohibits and the Free Exercise Clause requires. See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970). Though properly drawn moment of silence statutes are

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[24] The Court has noted that " 'it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day.' " *Jaffree*, 472 U.S. at 59 n.45 (quoting Brief for the United States as *Amicus Curiae* 10).

not mandated by the Free Exercise guaranty, they are within the range of permissible legislative choice.[25]

Indeed, in *Zorach* the Court recognized that, while public schools may not invite religious instructors into the school for purposes of religious instruction (*McCollum, supra*), government could nevertheless "accommodate[] the public service to [the students'] spiritual needs" by dismissing them to attend religious instruction. *Zorach*, 343 U.S. at 314. The government "may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." *Id.* But it can "suspend its operations" to permit private, voluntary devotion. *Id.* "No more than that is undertaken here." *Id.*

State efforts to facilitate opportunities for voluntary, private devotion in the public schools should be sustained so long as they do not infringe upon "the individual's freedom to choose his own creed." *Jaffree*, 472 U.S. at 52.[26] A statute such as New Jersey's, which

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[25] *Cf. Abington* v. *Schempp*, 374 U.S. 203, 299 (Brennan, J., concurring) ("hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion"). Nonmandatory religious accommodation by the government has a long history. For example, the First Congress debated whether the Second Amendment should provide that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 Annals of Cong. 434 (J. Gales ed. 1789). The language was deleted, in large part, because the decision whether to grant a religious exemption "ought to be left to the discretion of the Government." *Id.* at 750. This incident strongly supports the view that the various states have discretion to accommodate religious practice and belief. *See also* C. Anticau, A. Downey & E. Roberts, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses*, 62-91 (1964) (describing numerous early examples of governmental cooperation with religion).

[26] *Cf. Zorach*, 343 U.S. at 314 ("Government may not finance religious groups nor undertake religious instruction nor blend sec-

simply "permit[s]" a moment "for quiet and private contemplation or introspection" at the sole "discretion of the individual student" (N.J.S.A. 18A: 36-4) is neutral among religions and between religion and nonreligion. The statute neither favors one religion over another, nor "'convey[s] a message of endorsement or disapproval of religion.'" *Jaffree*, 472 U.S. at 61 (quoting *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring)). New Jersey students are, quite simply, "left to [their] own desires as to . . . [their] religious devotions, if any." *Zorach*, 343 U.S. at 311.[27] The New Jersey statute thus falls within the boundaries of permissible religious accommodation because it is both voluntary and neutral. A more striking example of permissible governmental "accommodation of all faiths . . . and hostility toward none" indeed "would be difficult to identify." *Lynch*, 465 U.S. at 677, 674.[28]

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ular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

[27] The New Jersey moment of silence statute is, if anything, less problematic than the released time program upheld in *Zorach*. A released time program advantages only religious students. By contrast, a moment of silence is completely neutral as between religious and nonreligious needs. A religious student may utilize the moment for prayer, an agnostic student for personal meditation, while yet another student may ponder an upcoming social event. *Cf. Jaffree*, 472 U.S. at 66 n.9 (Powell, J., concurring) ("[I]t is unlikely that many children would use a simple 'moment of silence' as a time for religious prayer. There are too many other subjects on the mind of the typical child").

[28] Justice O'Connor has suggested that an "accommodation" analysis applies only when government action "lifts a government-imposed burden on the free exercise of religion." *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). Although the Court's accommodation cases have not been strictly limited to instances where the government acts to lift government-imposed free exercise burdens (*Lynch, supra; Marsh, supra*), this case nevertheless falls within

An attempt "to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Jaffree*, 472 U.S. at 59; see also *Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring). First, "a moment of silence is not inherently religious." *Id.*[20] Second, "a pupil who participates in a moment of silence need not compromise his or her beliefs." *Id.* Third, a moment of silence involves no intrusion by the state into church affairs (*Lemon*, 403 U.S. at 614) and entails no interference with "the essential autonomy of religious life." *Marsh*, 463 U.S. at 803 (Brennan, J., dissenting). Finally, a simple moment of silence withstands objective characterization as governmental endorsement of an " 'official' or 'authorized' point of view on a matter of religion." *Marsh*, 463 U.S. at 806 (Brennan, J., dissenting). In sum, a neutral moment of silence statute, such as New Jersey's, does not pose any grave constitutional risks and therefore is a constitutional accommodation of

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this more restricted "accommodation" view. Unlike the situation in *Jaffree*, there is no other statutory provision in New Jersey which permits enjoyment of a moment of silence at the start of a school day. *Cf. Jaffree*, 472 U.S. at 84 (O'Connor, J., concurring) ("state law already provided a moment of silence to these appellees irrespective of [the challenged statute]"). Thus, the New Jersey statute does, in a very real sense, lift a state-imposed free exercise burden (the requirement that students attend school where moments for individual meditation are restricted) by providing a limited opportunity which can be used for private devotion or other contemplation. *Cf. Zorach, supra.*

[29] The New Jersey statute does not require any gesture, posture or attitude that necessarily connotes religious devotion. Although, as the district court noted, silence may be "one traditional form of prayer" (J.S. App. 82a), one simply cannot infer that all silent schoolchildren are praying. Thus, the statute requires neither that children engage or refrain from engaging in religious activity, nor that they be seen or perceived as so engaging or refraining.

religious preferences. *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring).[30]

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[30] The weight of scholarly authority also supports the constitutionality of a provision such as the New Jersey moment of silence statute. *See* McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1; Smith, *Now is the Time for Reflection: Wallace v. Jaffree and its Legislative Aftermath*, 37 Ala. L. Rev. 345, 375 (1986) (a "meditation or prayer" statute should be constitutional if: (1) it is adopted in an atmosphere less charged with religious zeal than that found in *Jaffree*; (2) the statute is the initial legislation (unlike *Jaffree*, in which a "meditation or prayer" statute followed a "meditation" statute); (3) the "meditation or prayer" statute was adopted for secular as well as religious purposes; and (4) the "meditation or prayer" statute is part of an educational strategy to promote tolerance and student expression); Comment, *Accommodating Religion in the Public Schools*, 56 Nebr. L. Rev. 425, 450-454 (1980) (a moment of silence is a reasonable and acceptable means of accommodating religion in the public schools); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967) (a moment of silence does not constitute an advancement of religion, it is rather a permissible accommodation in the interest of religious liberty); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1041 (1963) (moment of silence raises no serious constitutional concerns); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 371 (1963) (a moment of silence cannot be fairly characterized as solely religious since no student can know the subject of other classmates' reflections and no one can be compelled to alter his or her thoughts; Tribe, *American Constitutional Law*, § 14-6 at 828-829 (1978) (a moment of silence should withstand Establishment Clause scrutiny because it is "arguably non-religious"); Freund, *The Legal Issue in Religion and the Public Schools* 23 (1965) (the concept of religious neutrality does not bar silent prayer or meditation in the public schools). *See also* Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?*, 35 Rutgers L. Rev. 341, 355 (1983); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364, 372 (1983); Treiman, *Religion in the Public Schools*, 9 N. Ky. L. Rev. 229, 234-235 (1982). *But see contra* Comment, *Moment of Silence Statutes: An Improper Relation Between Church and State in Public Schools*, 54 U.M.K.C. L. Rev. 488, 509-510 (1986); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv L. Rev. 1874 (1983); Note,

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 13, 1987

Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U. L. Rev. 364, 406 (1983).

APPENDIX

No. 85-1551

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
Appellants,

RONALD and CATHERINE SOKALSKI,
Intervenors-Appellants

v.

JEFFREY MAY, *et al.*,
Appellees.

AFFIDAVIT OF RONALD SOKALSKI

1. I reside in Little Falls, New Jersey and am a natural parent and legal guardian of Lara Ann Sokalski who is a minor child enrolled in the New Jersey public school system. I make this affidavit in support of a motion to intervene as an appellant in this matter in order to argue in defense of the New Jersey moment of silence statute, N.J.S.A. 18A:36-4.

2. Lara Ann is nine years old and was born on July 16, 1977. She has been enrolled in the New Jersey public school system since kindergarten and presently is a fourth grade student in the Little Falls Elementary School No. 1.

3. I consider my daughter's public school education as one of the most important elements of her upbringing. I am actively involved in her schooling and concerned that she receive the best education possible.

4. I believe that a moment of silence at the start of her school day is a positive and beneficial factor. It is a time for her as well as the other students to gather their thoughts for the ensuing school day and recognize the importance of the subjects which they face. All of the children will have an opportunity to feel that they are part of a family within the school community where they spend the greatest part of their day. How they react and interact in that setting can positively affect each one of them. If the class feels as one, their behavior and deportment will lend itself to a productive day. Hopefully, my daughter will say a prayer at this time for guidance and help throughout the day. This will conform to my own personal religious belief.

5. The moment of silence does not promote or establish religious practices in the school. There is no obligation upon the children to pray. They may just relax and gather their thoughts before the start of the day. The importance of the moment of silence is for the children to start their day with a renewed belief that they will attempt to do well in their school work. My personal conviction is that a prayer will advance this goal and I believe that the school should be allowed to accommodate that conviction.

6. Without a state law clearly authorizing a teacher to begin school this way, I do not believe that Lara's teachers will begin with a moment of silence and without that time set aside I believe Lara's experience in school will suffer.

/s/ R. B. Sokalski
RONALD B. SOKALSKI

4/2/87
John P. Pullara
JOHN P. PULLARA
NOTARY PUBLIC OF NEW JERSEY

My Commission Expires Jan. 11, 1989

No. 85-1551

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
Appellants,

RONALD and CATHERINE SOKALSKI,
Intervenors-Appellants

v.

JEFFREY MAY, *et al.*,
Appellees.

AFFIDAVIT OF CATHERINE SOKALSKI

1. I reside in Little Falls, New Jersey and am a natural parent and legal guardian of Lara Ann Sokalski who is a minor child enrolled in the New Jersey public school system. I make this affidavit in support of a motion to intervene as an appellant in this matter in order to argue in defense of the New Jersey moment of silence statute, N.J.S.A. 18A:36-4.

2. Lara Ann is nine years old and was born on July 16, 1977. She has been enrolled in the New Jersey public school system since kindergarten and presently is a fourth grade student in the Little Falls Elementary School No. 1.

3. I consider my daughter's public school education as one of the most important elements of her upbringing. I am actively involved in her schooling and concerned that she receive the best education possible.

4. I believe that a moment of silence at the start of her school day is a positive and beneficial factor. It is a time for her as well as the other students to gather their thoughts for the ensuing school day and recognize the importance of the subjects which they face. All of the children will have an opportunity to feel that they are part of a family within the school community where they spend the greatest part of their day. How they react and interact in that setting can positively affect each one of them. If the class feels as one, their behavior and deportment will lend itself to a productive day. Hopefully, my daughter will say a prayer at this time for guidance and help throughout the day. This will conform to my own personal religious belief.

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6. Without a state law clearly authorizing a teacher to begin school this way, I do not believe that Lara's teachers will begin with a moment of silence and without that time set aside I believe Lara's experience in school will suffer.

/s/ Catherine W. Sokalski
CATHERINE W. SOKALSKI

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My Commission Expires Jan. 11, 1989

No. 85-1551

IN THE SUPREME COURT
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OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
Appellants,

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Intervenors-Appellants

v.

JEFFREY MAY, *et al.*,
Appellees.

AFFIDAVIT OF TWYLLA FLANDERS

1. My name is Twylla Flanders and I reside in Mahwah, New Jersey. I am currently employed as a school teacher in the New Jersey public school system. I teach remedial reading to grades one through eight at the Wandell Elementary School in Saddle River, New Jersey. I am making this affidavit based on my personal beliefs and experiences and not on behalf of the school system or any other official body or representative of the State of New Jersey.

2. I have been teaching elementary school children in New Jersey and elsewhere for sixteen years, and I believe that it is appropriate and educationally beneficial to begin the school day with a moment of silence. In my experience, the children can benefit from quiet contemplation, whether or not that contemplation is prayerful. In fact, there is no way of knowing what each child thinks about during that moment. A moment of silence, for meditation or prayer or simply for reflection and contemplation of the work ahead, is particularly appro-

priate at the beginning of a school day when children must begin the sometimes difficult process of focusing their attention on their lessons.

3. In the past, I have used a moment of silence at the start of the school day. Because of the current status of the New Jersey moment of silence statute, I presently do not require a moment of silence in any of my classes. I am aware that the moment of silence statute in New Jersey has been declared unconstitutional by a federal court and I am concerned that if I conducted a moment of silence in my classes, I would expose myself, and possibly my school, to legal liability. However, if the New Jersey moment of silence statute were in effect, and declared constitutional, I would employ a daily moment of silence in my classroom.

4. It is my personal belief that allowing for a moment of silence does not promote or establish any religious beliefs or practices in the public school. I do not believe that a moment of silence is coercive or in any way detrimental to children of diverse religious backgrounds. I certainly have never attempted to advance religion through a moment of silence.

5. In the absence of a state law authorizing me as a teacher to begin the school day with a moment of silence, I am constrained from using a moment of silence in my classroom. As I have stated, I believe that such a moment of silence is a useful and appropriate way to begin the school day. Therefore, I am making this affidavit in support of my motion to intervene as an appellant in this matter, on behalf of myself and other public school teachers in New Jersey who support the New Jersey moment of silence statute.

/s/ Twylla Flanders
TWLLLA FLANDERS

John H. Closthwaite
Commission Expires
6/24/89
Notary Public

Supreme Court, U.S.
FILED
MAY 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, ET AL.,

Appellants,

—v.—

JEFFREY MAY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AS APPELLANTS OF RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

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13 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. INTERVENTION CANNOT CURE JURISDICTIONAL DEFECTS THAT BAR A COURT FROM HEARING THE ORIGINAL ACTION..	3
II. MOVANTS DO NOT, AND CANNOT, ASSERT A SEPARATE AND INDEPENDENT BASIS FOR JURISDICTION IN THIS § 1983 SUIT ...	5

TABLE OF AUTHORITIES

Cases	PAGE
Bender v. Williamsport Area School District, 475 U.S. ____, 89 L.Ed.2d 501 (1986)	7
Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978)	5
Black v. Central Motor Lines, Inc., 500 F.2d 407 (4th Cir. 1974)	4
Cane Creek Conservation Authority v. Orange Water and Sewer Authority, 590 F. Supp. 1123 (M.D.N.C. 1984)	4
Diamond v. Charles, 476 U.S. ____, 90 L.Ed.2d 48 (1986)	3, 4, 7, 8
Eastern-Central Motor Carriers Assoc. v. United States, 321 U.S. 194 (1944)	5
Fuller v. Volk, 351 F.2d 323 (3d Cir. 1965)	6
Horn v. Eltra Corp., 686 F.2d 439 (6th Cir. 1982)	6
ICC v. Southern Railway Co., 380 F. Supp. 386 (M.D. Ga. 1974), *aff'd*, 543 F.2d 534 (5th Cir. 1976)	4
Karcher v. May, 93 L.Ed.2d 995 (1987)	1
Keith v. Louisiana Department of Education, 553 F. Supp. 295 (M.D.La. 1982)	7
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	6
McClune v. Shamah, 593 F.2d 482 (3d Cir. 1979)	4
Mattice v. Meyer, 353 F.2d 316 (8th Cir. 1965)	4
Mullaney v. Anderson, 342 U.S. 415 (1951)	5, 6
NAACP v. New York, 413 U.S. 345 (1973)	2
Pusey & Jones Co. v. Hanssen, 261 U.S. 491 (1923)	4
Simmons v. ICC, 716 F.2d 40 (D.C. Cir. 1983)	6

PAGE

Truvillion v. King's Daughters Hospital, 614 F.2d 520 (5th Cir. 1980) 4

United States Steel Corp. v. EPA, 614 F.2d 843 (3d Cir. 1979) 6

United States v. Terminal Railroad Assoc., 236 U.S. 194 (1915) 5

United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157 (1914) 4

Statutes and Rules

42 U.S.C. § 1983 ..... 2, 6, 7

N.J.S.A. 18A:36-4 ..... 1, 2, 7

Fed. R. Civ. P. 21 5

Fed. R. Civ. P. 24 ..... 2, 5

Treatises

3B J. Moore & J. Kennedy, *Moore's Federal Practice* (2d ed. 1987) 4

7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (2d ed. 1986) 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, ET AL.,

Appellants,

—v.—

JEFFREY MAY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AS APPELLANTS OF RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

Movants, Ronald and Catherine Sokalski and Twylla Flanders, three residents of the State of New Jersey, seek to intervene as party defendants-appellants in this action in an attempt to create jurisdiction that is otherwise lacking in order to support the New Jersey minute of silence statute, N.J.S.A. 18A:36-4 ("Section 36-4"). Plaintiffs-appellees Jeffrey May, *et al.*, oppose this motion, but, in any case, believe it could only be granted if the Court first decides that appellant Alan Karcher has standing to pursue this appeal.[1]

---

1 Appellees will argue in their brief on the merits that the Court must dismiss this case because Karcher lacks standing to appeal. *See also* Appellees' Motion to Dismiss or Affirm, at 2-17; Brief for the United States as Amicus Curiae, at 7-13. This Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. *Karcher v. May*, 93 L.Ed.2d 995 (1987).

Movants focus exclusively on whether they meet the elements necessary to intervene that are specified in Fed. R. Civ. P. 24, which presumes a valid preexisting litigation. Movants, however, ignore the underlying jurisdictional question: If Karcher lacks standing to pursue this appeal, and consequently there is no case or controversy under Article III before this Court, does Rule 24 permit these movants to intervene in an attempt to create Article III jurisdiction?[2] Appellees contend that the answer is no. First, where a court lacks jurisdiction under Article III, there is no case or controversy in which to intervene. Second, movants do not assert, nor could they assert, any claims or counterclaims that give them a separate or independent basis for jurisdiction in this § 1983 action.

---

2 If this Court decides that Karcher has standing to pursue this appeal, then intervention is unnecessary because movants will be adequately represented. Appellees would not oppose the Court's treatment of movants' brief as an *amicus curiae* brief on the merits. Movants admit that they are proper *amici curiae*. *Motion for Leave to Intervene as Appellants*, at ix n. 6 ("Motion"). The only possible purpose for this motion, one which movants do not deny, is to attempt to create jurisdiction if the Court finds that none otherwise exists.

In any case, intervention is not appropriate because this motion is not "timely," as Rule 24 requires. "Timeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). From the sparse affidavits, it is clear that movants have been aware of this lawsuit since Section 36-4 was enjoined in January 1983. For over four years they failed to act to protect their alleged interests in the statute. Had movants timely intervened in the district court, appellees could have determined the extent of the interests they allege. At this stage, appellees are forced to respond to bare-boned affidavits. At a minimum, movants should have been aware by April 1986 that the New Jersey legislature would not prosecute an appeal to this Court. Yet they waited an entire year prior to acting. This Court should discourage such disruptive and dilatory tactics.

I. INTERVENTION CANNOT CURE JURISDICTIONAL DEFECTS THAT BAR A COURT FROM HEARING THE ORIGINAL ACTION

Last term, this Court decided an issue almost identical to that raised by the movants, and reaffirmed a position it has held for over 70 years. In *Diamond v. Charles*, 476 U.S. ____, 90 L.Ed.2d 48 (1986), the Court held that an individual who had intervened below lacked standing to pursue an appeal to this Court when the State, which had actively defended the constitutionality of its statute in the lower courts, refused to appeal to this Court. "[I]n the absence of the State in that capacity [of an appellant], there is no case for Diamond to join." *Id.* at 59. No meaningful difference for Article III purposes exists between the situation in which a State refuses to appeal and the State withdraws its appeal and its purported representative (Karcher) is found to lack standing. If anything, the individual movants here present a significantly weaker claim than Diamond that individuals should be permitted to substitute for the State. Diamond had intervened below when the state was a proper defendant; his intervention was not for the sole purpose of creating jurisdiction, unlike the situation here.

The Court's words in *Diamond* are particularly apt here, where state residents attempt to create jurisdiction to defend a state statute that neither the executive nor legislative branch of New Jersey wishes to defend:

> The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests.

> But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. . . . Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" . . . in defending the standards embodied in that code.

Id. (citations omitted).

Similarly, in *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914), the Court held that when a creditor sued prior to the time the statutory cause of action accrued, intervention by another creditor at a time when the suit properly could have been brought "could not cure this vice in the original suit," *id.* at 163-64, and the intervention "must abide the fate of that suit," *id.* at 164. *See also Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 501 (1923) (rejecting as "clearly unsound" an argument that intervention of particular party cured lack of equity jurisdiction).

The lower federal courts have consistently adhered to this position that "[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action. Intervention presupposes the pendency of an action in a court of competent jurisdiction and cannot create jurisdiction if none existed before." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1917 at 457-58 (2d ed. 1986) (footnotes omitted). *See, e.g., Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 526 (5th Cir. 1980); *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974); *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965); *Cane Creek Conservation Authority v. Orange Water and Sewer Authority*, 590 F. Supp. 1123, 1128 n.7 (M.D.N.C. 1984); *ICC v. Southern Railway Co.*, 380 F. Supp. 386, 394 (M.D. Ga. 1974), *aff'd*, 543 F.2d 534 (5th Cir. 1976); *see also* 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.18[3], at 24-200, -206 (2d ed. 1987).

Appellees take no exception to the general principle that "this Court clearly has authority to permit a party to intervene in the first instance in this Court." Motion, at v. None of the cases cited by movants, however, are responsive to whether an intervenor can create jurisdiction that is otherwise lacking in this Court. The Rule 24 cases cited by movants, *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), *Eastern-Central Motor Carriers Assoc. v. United States*, 321 U.S. 194 (1944), and *United States v. Terminal Railroad Assoc.*, 236 U.S. 194 (1915), all involved instances in which the original party remained in the lawsuit throughout the proceedings. No questions concerning the Court's jurisdiction arose in these cases. They involved unexceptional instances in which a party intervened to protect its undisputed interests in the outcome of ongoing proceedings between the original parties. Movants cite no cases, and appellees have discovered none, in which this Court has permitted intervention under Rule 24 for the sole purpose of creating jurisdiction where none otherwise existed.

II. MOVANTS DO NOT, AND CANNOT, ASSERT A SEPARATE AND INDEPENDENT BASIS FOR JURISDICTION IN THIS § 1983 SUIT

While the law is clear that an intervenor cannot create jurisdiction when none currently exists, some lower federal courts have held that when "there is an independent basis for jurisdiction with regard to the intervenor the court has discretion to treat his pleading as a separate action in order to adjudicate the claims raised by him." 7C *Federal Practice and Procedure*, *supra*, § 1917 at 458-59 (footnote omitted) (collecting cases).[3] However, "[a]n intervenor lacking an independent

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3 Assuming that *Mullaney v. Anderson*, 342 U.S. 415 (1952), which involved the addition of parties pursuant to Fed. R. Civ. P. 21, is relevant to intervention under Rule 24, it fits within this narrow exception. The original plaintiffs in *Mullaney* were merely the agents of the added parties, and "[t]o grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent." *Mullaney*, 342 U.S. at 417. The added plaintiffs had jurisdiction to initiate litigation and raise claims on their own behalf

jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction." *Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983) (Scalia, J.); *see also Horn v. Eltra Corp.*, 686 F.2d 439, 440-41 (6th Cir. 1982).[4]

Movants do not even assert, nor could they, that there is separate and independent federal jurisdiction between themselves and the plaintiffs-appellees in this § 1983 action. First, movants are not proper defendants, because they could not have been sued by these plaintiffs. Plaintiffs initiated this action in the District Court under 42 U.S.C. § 1983. The only proper defendants in a section 1983 suit are those acting "under color of state law," *i.e.*, state officials or those participating in joint activity with them. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Thus, the New Jersey State legislature, although not named by plaintiffs as a defendant, had Article III standing to pursue this matter as defendants-intervenors in the courts below. However, no one, least of all movants, alleges that movants have acted "under color of state law" to deprive these plaintiffs of any "rights, privileges or

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separate and independent of the original plaintiffs. In addition, "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration . . . ." *Id. See Fuller v. Volk*, 351 F.2d 323, 329 (3d. Cir. 1965) (when intervenor has separate and independent basis for jurisdiction, intervention permitted if "failure to adjudicate the claim will result only in unnecessary delay").

4 One Court has held that in the unique circumstances in which a petitioner has timely filed a challenge within the requisite 60 days to a federal agency action, and in which an intervenor, after the 60-day period, timely intervened to protect its own interest, the intervenor could continue to pursue its own claims after the petitioner voluntarily withdrew from the case. *United States Steel Corp. v. EPA*, 614 F.2d 843, 845-46 (3d Cir. 1979). That court stressed that the "intervention was not an attempt to cure a jurisdictional defect. Rather, it was an explicit attempt to insure that Scott's interests, which were related but not identical to those of U.S. Steel, were adequately represented in the ongoing proceeding." *Id.* at 846.

immunities." 42 U.S.C. § 1983.[5] Thus, they cannot be proper defendants in this action, and there is no case or controversy within the meaning of Article III between the plaintiffs and those now seeking to intervene as defendants-appellants. The fact that movants seek to defend the state's statute on appeal does not alter the Article III case or controversy requirement. *Bender v. Williamsport Area School District*, 475 U.S. ____, 89 L.Ed.2d 501, 515 (1986); *see also Diamond*, 90 L.Ed.2d at 61.[6]

Second, movants do not raise any affirmative claims cognizable under Article III against these plaintiffs. It is obvious that movants could not sue plaintiffs-appellees in District Court to have section 36-4 declared constitutional.[7] *See, e.g., Keith v. Louisiana Department of Education*, 553 F. Supp. 295, 299 (M.D.La. 1982). Movants do not even attempt to explain why they should be able to raise such a claim for the first time before *this* Court. In reality, movants merely seek to substitute themselves for Karcher and his claims in the event

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5 The mere fact that Twylla Flanders is a public school teacher does not change this result. She fails to allege that any of the plaintiffs in this suit are students or parents of students in the school where she teaches and, in fact, none are. Moreover, she expressly states that she will not use a moment of silence in her class unless such a statute were in effect *and* declared constitutional. Thus, she does not threaten to deprive any persons of any rights cognizable in a section 1983 suit, nor does she even allege that anyone has threatened to sue her. Motion, at 6a. Consequently, there is no Article III case or controversy between these plaintiffs and Flanders.

6 As in *Diamond*, the motion does not present the question whether an intervenor must have an independent basis for jurisdiction when there is ongoing jurisdiction between the original parties. *See Diamond*, 90 L.Ed.2d at 62 & n.21; *id.* at 65 (O'Connor, J. concurring).

7 Movants appear to claim an unarticulated right to a minute of silence in the public schools. Such a claim is not the subject of the instant lawsuit, and was in no way litigated below. Moreover, such a claim must be asserted against the appropriate state or local officials, not the plaintiffs-appellees currently before this Court.

this Court finds he lacks standing. This they may not do, as this Court made clear last Term in *Diamond*.

Respectfully submitted,

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No. 85-1551

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OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
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v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
Moment-of-Silence Statutes Such As The New Jersey Statute Operate In The Classroom As A State Endorsement Of Prayer	5
A. The Court's Assumptions In *Wallace v. Jaffree*	5
B. Classroom Perception Of Moment-of-Silence Statutes	8
C. Classroom Effects Of Moment-Of-Silence Statutes	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Abington School District v. Schempp, 374 U.S. 203 (1963) ..... *passim*

Bender v. Williamsport Area School District, 106 S. Ct. 1326 (1986) 3

Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983) 6, 14, 16

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Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948) 16

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) 8

Lynch v. Donnelly, 465 U.S. 668 (1984) 6

May v. Cooperman, 572 F. Supp. 1561 (1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985), *juris. postponed sub nom. Karcher v. May*, 107 S. Ct. 946 (U.S. Jan. 27, 1987) (No. 85-1551) 16

Stone v. Graham, 449 U.S. 39 (1980) (per curiam) 14

Tilton v. Richardson, 403 U.S. 672 (1971) 13

Wallace v. Jaffree, 472 U.S. 38 (1985) ..... *passim*

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TABLE OF AUTHORITIES—Continued

	Page
Byrnes, *Life Skills in Solitude and Silence in the School*, 104 Educ. 96 (1983)	12
New York Times, March 2, 1984	13
New York Times, March 11, 1984	9, 13, 17
Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. Rev. 364 (1983)	12
Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983)	9, 15
U.S.A. Today, April 3, 1987	9
Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. Pol. Q. 189 (1968)	11
Wall Street Journal, March 5, 1984	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, *et al.*,
Appellants,

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

INTEREST OF AMICUS CURIAE

The American Association of School Administrators ("AASA") is the national professional organization for school district administrators and other educators in our nation's public schools. AASA's members include approximately 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies. AASA's members are thus responsible

for the daily operation of our nation's diverse public school systems.

Throughout its history, AASA has been concerned with the relationship between religion and public schools. In 1964 AASA published its first edition of *Religion in the Public Schools*, offering guidelines to school administrators charged with implementing this Court's decisions regarding prayer and Bible reading in public schools. In a new edition of *Religion in the Public Schools*, AASA observed: "No institution in society has been asked to walk the constitutional 'tight rope' between the two Religion Clauses more frequently than the public schools." AASA, *Religion in the Public Schools* 7 (1986). Summarizing for its members the decisions of this Court concerning school prayer and moment-of-silence statutes, AASA stated:

> It is important to note that in neither the New York nor the Alabama case did the Supreme Court rule "voluntary prayer" unconstitutional. In fact, one of the main reasons the Court objected to both the spoken prayer in *Engel v. Vitale* and the silent prayer in *Wallace v. Jaffree* was they were not voluntary—there was the element of implied coercion that is inherent in any state-sponsored religious exercise.

Id. at 18.

In addition to advising its membership concerning these issues, AASA has publicly expressed its perspective on religion and the public schools at the federal level. Testifying before Congress in 1983 on prayer in the public schools, AASA observed that "prayer is a very personal experience and religion an individual matter. Mixing education and religion in the public schools of our diverse society is not . . . [a] sound practice . . . ." *Voluntary School Prayer Constitutional Amendment: Hearings on S.J. Res. 73 & S.J. Res. 212 Before Subcomm. on the Constitution of the Senate Comm. on the Judi-*

ciary, 98th Cong., 1st Sess. 543, 548 (1983) [hereinafter *Hearings*] (statement of Ira J. Singer).

Similarly, during this Court's October Term, 1984, AASA filed an amicus brief in *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986). Based on its members' experience, AASA opposed mandatory inclusion of religious activities in extracurricular programs of secondary schools as required by the Equal Access Act, Pub. L. No. 98-377 (1984). Brief of Amicus Curiae AASA, *Bender v. Williamsport Area School District*, No. 84-773. AASA explained that students "would be likely to perceive a message of state endorsement of such religious activities" and that despite the efforts of school officials, the resulting "school disruption and community strife would undermine the schools' educational program . . . ." *Id.* at 4.

Moment-of-silence statutes present similar concerns. AASA members have many years' experience with the operation of state laws calling for school prayer or moments of silence and will be charged with implementing the Court's decision in this case. For the reasons discussed below, AASA supports the judgments of the district court and court of appeals in this case, holding the New Jersey moment-of-silence statute unconstitutional.[1]

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[1] This brief is submitted by AASA with the written consent of the parties, copies of which have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), various Justices of this Court noted that, unlike state laws requiring prayer in public schools, a state statute calling only for a moment of silence at the beginning of each school day might well pass constitutional muster. The Justices indicated that the practical effect of these statutes would bear on their constitutionality.

These Justices assumed, and correctly so, that teachers may have legitimate pedagogical reasons for a moment of silence at various times during a school day. The Justices also assumed, however, that moments of silence held at the beginning of each school day pursuant to state law do not convey state encouragement of prayer.

The experience of our members teaches us that the latter assumption is false; instead, administrators, teachers, parents, and students understand moments of silence imposed by state legislatures as the legislatures' attempt to return prayer to the classrooms. Although state legislatures may cite reasons of pedagogy and accommodation of religion in support of the statutes, all of the moment-of-silence statutes were passed after this Court's decisions banning school prayer and are perceived as an effort to reintroduce it. The statutory moment of silence thus undermines the schools' efforts to respect in practice the constitutional freedoms they teach in formal lessons. In a society of increasing religious diversity, moreover, the statutory moment of silence not only may be offensive to some non-Christians, but also may subtly pressure non-Christians to conform to the Christian "norm." In practice, therefore, the moment-of-silence statutes serve to expand religious worship beyond the home, the church, and the soul of the individual worshiper—where it belongs—and inject it into public school programs—where it does not belong.

ARGUMENT

MOMENT-OF-SILENCE STATUTES SUCH AS THE NEW JERSEY STATUTE OPERATE IN THE CLASSROOM AS A STATE ENDORSEMENT OF PRAYER

A. The Court's Assumptions in *Wallace v. Jaffree*

In *Wallace*, the Court struck down an Alabama statute permitting a moment of silence for " 'meditation or voluntary prayer' " at the beginning of each school day. 472 U.S. at 59, 61. The three opinions invalidating the statute, however, implied that *other* moment-of-silence statutes—such as the one presented in this case—might not violate the Establishment Clause.

Thus, Justice Stevens' opinion for the Court in *Wallace* did not question the constitutionality of an Alabama statute requiring a moment of silence "for meditation" at the beginning of each school day. His opinion characterized such a statute as "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence" and as being "quite different" from a statute whose intent was "to return prayer to the public schools." 472 U.S. at 59.

Justice O'Connor addressed the question more directly and at greater length. She noted, first, that the Alabama statute requiring a moment of silence "for meditation" had the effect of "facilitat[ing] voluntary silent prayer of students who are so inclined" and that "[t]he parties . . . concede the validity of this enactment." *Id.* at 67 (O'Connor, J., concurring in the judgment). More importantly, Justice O'Connor wrote separately "to explain why moment of silence laws . . . do not necessarily" have the "purpose and likely effect" of "endors[ing] . . . voluntary prayer" and may therefore be constitutional. *Id.*

The considerations that caused Justice O'Connor to assume that such statutes would not have the effect of endorsing prayer were that (1) "a moment of silence is

not *inherently* religious" and "*need not* be associated with a religious exercise"; (2) "a pupil who participates in a moment of silence *need not* compromise his or her beliefs"; (3) "[b]y mandating a moment of silence, a State does not *necessarily* endorse any activity that might occur during the period"; and (4) "there is *arguably* a secular pedagogical value to a moment of silence in public schools . . . ." *Id.* at 72, 73, 75 (emphasis added). Accordingly, Justice O'Connor concluded that "moment-of-silence laws in many states *should* pass Establishment Clause scrutiny because they do not favor the child who chooses to pray . . . over the child who chooses to meditate or reflect." *Id.* at 76-77 (emphasis added).

She added, however, that the final determination of the constitutionality of these statutes presents a mixed question of fact and law and that, consequently, two kinds of information affect the determination: "evidentiary submissions" regarding the implementation of the statute; and an analysis of whether "an objective observer, acquainted with the text, legislative history, and implementation of the statute, *would perceive it* as a state endorsement of prayer in public schools." *Id.* at 76 (emphasis added).[2] Such information is to be used by the Court to resolve "[t]he crucial question . . . whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Id.* at 73 (footnote omitted).

Finally, in his concurring opinion in *Wallace*, Justice Powell "agree[d] fully with Justice O'Connor's assertion that some moment-of-silence statutes may be constitu-

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[2] *See also Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (considering whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1016 (D.N.M. 1983) ("The ill lies in the public's *perception* of the moment of silence as a devotional exercise").

tional, a suggestion set forth in [Justice Stevens'] opinion as well." *Id.* at 62 (footnote omitted).

Given these three opinions, it appears to us that the Court is predisposed to believe that (1) there are valid pedagogical reasons for a moment of silence and such moments need not convey state encouragement of prayer; and (2) in practice, moment-of-silence statutes are, in fact, based on valid pedagogical considerations and in the classroom are not perceived as state encouragement of prayer. We could not agree more with the first proposition: there are myriad situations in which a teacher must have the pedagogical discretion to impose a moment of silence—for example, to restore order, to focus attention, or to prepare students for learning. Indeed, such moments are appropriate and must be available to teachers *throughout* the school day, not merely at the beginning of the first hour.

But our experience teaches us that the Court's second assumption is wrong. Even though moments of silence are a legitimate pedagogical tool and have been used for decades in our schools—both before and after this Court's school prayer decisions—the moments of silence *imposed* by state legislatures in the wake of those decisions are an entirely different proposition. Whatever facial purpose may have been invoked by the legislatures for the passage of such statutes, administrators, teachers, parents, and students understand those statutes as the legislatures' attempt to restore and encourage prayer in the classrooms.

Accordingly, because we believe the Court may have a misperception concerning the practical effect of those statutes, and because *Wallace* makes clear that the Court wishes to consider those practical effects in reviewing the constitutionality of such statutes, we summarize below our experience with them.

B. Classroom Perception of Moment-of-Silence Statutes

Twenty-five years ago this Court declared that state-sponsored Bible-reading or state-sponsored prayer recitation conducted as a brief exercise at the beginning of each school day violates the Establishment Clause. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). This was so in the case of prayer even though the prayer was "non-denominational" and its recitation by students was wholly voluntary; and this was so, in the case of Bible reading, even though the verses were read without comment and any student who wished could be excused from the reading. *Engel*, 370 U.S. at 430; *Schempp*, 374 U.S. at 205, 211. The Court treated these state-sponsored activities as unconstitutional even though they were brief and arguably were "relatively minor encroachments on the First Amendment." *Id.* at 225. Once the states had "us[ed] [their] public school system to encourage recitation of . . . prayer" or to encourage participation in a "religious exercise," they had "adopted . . . practice[s] wholly inconsistent with the Establishment Clause." *Engel*, 370 U.S. at 424; *Schempp*, 374 U.S. at 224. This Court therefore forbade them.

It is no secret to this Court—or to teachers and students—that significant disapproval, resistance, and attempted circumvention of *Engel* and *Schempp* continue to this day. In some instances, the resistance has taken the form of outright defiance in communities that continue to conduct prayer and devotional activities notwithstanding this Court's decisions.[3] In other instances, the

[3] For example, in 1981 this Court was called upon again to rule on a state statute allowing students to offer voluntary prayers at the beginning of the school day. *See Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). Indeed, as the Court knows, *Wallace* itself was a case in which the district court expressly rejected this Court's views regarding school prayer. *See Wallace*, 472 U.S. at 45. In addition, various commentators have

resistance has taken the form of organized efforts to pass a constitutional amendment permitting voluntary school prayer.[4]

But by far the most significant and widespread reaction to the 1962 and 1963 decisions forbidding school-prayer exercises has been the adoption of moment-of-silence statutes in some 25 states across the country. Although the statutes vary somewhat from state to state, as Justice O'Connor explained in her *Wallace* opinion, they typically provide for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect. 472 U.S. at 72 (O'Connor, J., concurring in the judgment).

Several important points are well-known about these statutes. First, they all were passed in the wake of this Court's decisions banning school prayer.[5] That is to say, not one of the 25 legislatures thought a law mandating "*a moment of silence*" at the beginning of each day was necessary until this Court prohibited *a moment of prayer* at the beginning of each day. The apparent religious purpose of the moment-of-silence statutes is thus immediately "manifested" by their "sequence and history." *Wallace*, 472 U.S. at 65 (Powell, J., concurring).

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offered anecdotal evidence concerning continuing prayer in the public schools. *See* Bacon, *Court Ruling Hasn't Quieted School Prayer*, U.S.A. Today, April 3, 1987, at 3A; Rosenbaum, *Prayer in Many Schoolrooms Continues Despite '62 Ruling*, N.Y. Times, March 11, 1984, at 1; Wermiel, *High Court's Rulings Against School Prayer are Often Violated*, Wall St. J., March 5, 1984, at 1.

[4] *See, e.g., Hearings, supra* p. 3; *Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings Before the Comm. on the Judiciary on S.J. Res. 199*, 97th Cong., 2nd Sess. (1982).

[5] Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874, 1880 (1983).

Second, many of the statutes are ostensibly based on certain pedagogical values. Commonly cited values include the need for the students to quiet themselves, the need for introspection, and the need for a transition into the school day. Such values are, in fact, cited as a rationale for the statute in the present case.[6] Again, however, these are values that no legislature perceived as warranting a mandatory moment of silence until prayer exercises were prohibited by this Court's decisions.[7]

Third, many of the moment-of-silence statutes are also ostensibly premised on the need to "accommodate" those students who wish to pray. Those who suggest this premise contend that the statutes reflect a "hands-off" policy toward religion, simply permitting an opportunity for prayer for those students who wish to pray during the school day. Such an accommodation need is cited in the present case.[8] What is *not* cited is any basis for believing that without such a statute students in our nation's schools who *wish* to pray would have *no* available moment to do so.

The final point which we believe is well-known about these statutes is that, whatever purposes are cited by the legislatures, they were designed to serve a "hands-on" policy of encouraging prayer in the public schools. Be-

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[6] Brief of Appellants at 41 (reciting New Jersey legislature's "purpose of providing public school students with a transition period at the commencement of the school day").

[7] Thus, appellants contend that the New Jersey statute requires only a "plausible" pedagogical purpose in order to withstand judicial scrutiny. Brief of Apellants at 29, 30, 36, 37. Appellants' emphasis on the statute's "plausible" purpose of course leaves open the issue of the statute's *genuine* purpose. *See* Brief for Appellees. In any event, whatever "plausible" purpose the statute may have had, this is a separate question from the *perceived* purpose in the classroom.

[8] *See* Brief for the United States as Amicus Curiae at 15.

fore *Engel* and *Schempp*, schools encouraged prayer by actually conducting a "moment of prayer"; now they encourage prayer through a state-mandated "moment of silence."[9] The Alabama legislature was imprudent enough to acknowledge this fact, and as a consequence, its statute was struck down. Other legislatures are more circumspect and so cite pedagogical values or "accommodation" needs to support their statutes. But we would suggest to the Court that the purpose of all such statutes is the same—to restore and encourage prayer in the public schools.[10]

Nevertheless, we do not purport in this brief to advise the Court concerning the "true purpose" of these statutes. It is not our business and is certainly no part of our expertise to second-guess the motives of state legislatures; legislators do what they feel they must to write laws that will both serve their constituents' demands and survive judicial scrutiny. But it *is* our business and part of our expertise to administer laws these legislatures make mandatory in the public schools. Based on that experience, we know how the vast majority of our school administrators and teachers perceive these laws; and we think we have a good understanding of how our students and their parents perceive them. Simply put, they are not fooled.

They know that a moment-of-silence statute is not necessary for a teacher to have the authority to call for

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[9] As one commentator observed, the percentage of classrooms with explicit prayer practices decreased at the same time as the number of classrooms observing silent meditation increased. *See* Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. Pol. Q. 189, 190 n.6 (1968).

[10] Thus, the United States candidly acknowledges that "[t]he courts below were no doubt correct that the purpose of a 'moment of silence' statute has something to do with prayer." Brief for the United States as Amicus Curiae at 15; *see id.* at 17.

silence when true pedagogical reasons require it.[11] They know that such a statute is not necessary to permit prayer during the day by students who truly wish to pray.[12] And while their morning ritual once called "moment of prayer" is now called "moment of silence," they know that the essential content and intent of that moment have not changed.

This Court has repeatedly held—most recently in *Wallace* itself—that the state must maintain strict neutrality in matters of religion and, therefore, must take no action perceived as encouraging prayer in the public schools.[13] That is clearly how these moment-of-silence statutes are perceived in those schools. For example, one Long Island teacher characterized the debate over a moment of silence

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[11] A teacher may call for a moment of silence at any time as required by a properly structured lesson plan. *See, e.g.*, Joint Appendix (hereinafter "J.A.") at 196, 220-221, 229 (testimony of Dr. Peter Kuriloff, Associate Professor of Education, University of Pennsylvania); Byrnes, *Life Skills in Solitude and Silence in the School*, 104 Educ. 96 (1983); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. Rev. 364, 399 (1983). Intervenor-appellant Flanders thus is misguided in her assertion that she is precluded from calling for a moment of silence in her classroom in the absence of an authorizing state statute. *See* Brief for Intervenors-Appellants, App. 6a (Affidavit of Twylla Flanders).

[12] "Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday." *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring in the judgment); *see Hearings, supra* p. 3, at 541 (statement of Ira J. Singer); J.A. at 249 (testimony of Dr. Houston, Superintendent of Princeton, New Jersey public schools).

[13] *Wallace*, 472 U.S. at 48-55; *Engel*, 370 U.S. at 436 ("governmental endorsement of that prayer seems relatively insignificant" but it is nevertheless unconstitutional); *Schempp*, 374 U.S. at 226 ("In the relationship between Man and religion, the State is firmly committed to a position of neutrality.").

as "Does God stay in Hicksville or does God go?" [14] Another teacher stated that a silent period, in effect, created a time for group prayer that "is absolutely inappropriate." [15] The Princeton, New Jersey superintendent testified that his impression of the New Jersey statute was that "it was essentially a way of putting prayer into the school setting in a way that would perhaps get around the original Supreme Court rulings." [16] This perception was shared by the teachers, students, administrators, and parents in the district; and members of the Board of Education personally opposed it for the same reason.[17]

In our judgment, these perceptions concerning the statutes were inevitable; and their tendency to encourage prayer by students who would not have otherwise prayed is also inevitable. Devout students will be unaffected because, as stated, those who wish to pray during the school day will find ample opportunity to do so, with or without a moment of silence. Similarly, students wholly opposed to praying will not do so, whether or not there is a moment of silence. But many—we would suggest most—students fall in between. They would not have prayed at school but for the fact that state law required their teacher to set aside a moment for them to do so if they chose. As this Court has said, students in our public schools are "impressionable" children.[18] When the state legislature conveys to those students that the opportunity

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[14] *Silent Meditation Time Banned at School on L.I.*, N.Y. Times, March 2, 1984, at B2.

[15] Rosenbaum, *supra* note 3, at 32. The teacher explained that she was not concerned about students praying individually.

[16] J.A. at 229.

[17] *Id.* at 28 (Affidavit of Mark Tulloss), 39-40 (Affidavit of Jeffrey May), 43 (Affidavit of Rita Rothenberg), 234 (testimony of Dr. Houston), 377 (testimony of Dr. James Connerton).

[18] *Tilton v. Richardson*, 403 U.S. 672, 686 (1971); *accord, Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

for prayer is so important that a law requires the first moment of every school day to be set aside for that opportunity, they will be *encouraged* to pray. There is simply no doubt about that. This Court should acknowledge it to be so.[19]

C. Classroom Effects of Moment-of-Silence Statutes

Our concern with statutes such as the present one is not simply our opposition to a religious incursion in the classroom. We are concerned as well with the practical, detrimental effects such an incursion may bring. We wish to bring two such effects to the attention of the Court.

The first is the harm done to one of the most important values taught in public schools: the benefits and responsibilities of citizenship. This Court recognized in *Wallace* itself that a primary purpose of our public schools is to "educat[e] the young for citizenship." 473 U.S. at 61 n.51 (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). One of the critical ways schools impart this education is when both by word and by deed they "scrupulous[ly] protect[] constitutional freedoms." *Id.* Such scrupulous protection is impossible if teachers are required, "[w]ith a wink and a nod," to lead their students in a "moment of silence" which they must describe as having a secular purpose. *Duffy*, 557 F. Supp. at 1023.

Worse, however, is the second harmful effect of these statutes—the divisiveness they bring to many of our nation's classrooms, particularly those where the diversity

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[19] We repeat again that there *are* legitimate applications of a moment of silence in public schools, just as there *are* legitimate uses of the Ten Commandments and the Bible in public schools. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam); *Schempp*, 374 U.S. at 225. But where the Ten Commandments, the Bible, or a state-mandated moment of silence are injected into the classroom in order to encourage or promote religious activity, they should be prohibited.

of religious beliefs is great. As the United States observes, "[o]urs is a nation of great religious diversity." Brief for the United States as Amicus Curiae at 16 n.13. In 1957, 66% of the population stated its religious preference as Protestant, 26% as Catholic, 3% as Jewish, 1% as other, and 3% as none. In 1985, 57% stated its religious preference as Protestant, 28% as Catholic, 2% as Jewish, 4% as other, and 9% as none.[20] The "none" and "other" categories increased from 4% of the population in 1957 to 13% in 1985. In the United States there are more than 289 denominations; Mormons outnumber Presbyterians; and there are almost equal numbers of Episcopalians and Moslems.[21]

Contrary to the unsupported assertion of the United States that the moment of silence fosters " 'harmony and tolerance among the pupils' ",[22] our experience teaches that what is actually fostered is divisiveness. A mandatory moment of silence for prayer or meditation is simply ill-suited to our religiously diverse classrooms. A moment of silence, after all, is a particularly Christian form of prayer,[23] and it is held at the traditional time for Christian prayer, the beginning of the day. But other religions

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[20] Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States: 1987* 53, No. 76 (107th ed.).

[21] AASA, *Religion in the Public Schools* 3 (1986) (citing *Handbook of Denominations in the United States* (1975); *1985 Yearbook of American and Canadian Churches*). The superintendent of the Princeton, New Jersey school system testified in this case that his school district has Catholic, Protestant and Jewish students, as well as students from over 40 countries, representing "the other major religions in the world . . . ." J.A. at 227-228.

[22] Brief for the United States as Amicus Curiae at 16 n.13 (citing *Schempp*, 374 U.S. at 280 (Brennan, J., concurring)).

[23] J.A. at 143 (testimony of Dr. Langdon Gilkey, a Baptist minister and theology professor at the University of Chicago Divinity School). *See* Note, *supra* note 5, at 1886 n.76 (suggesting a moment of silence is "designed for the repetition of a verse the length of the Lord's prayer").

pray or meditate in different ways. As the district court noted:

> In the traditional American culture silence, bowing one's head and clasping one's hands is associated with prayer. This reflects the development of Protestantism, Reform Judaism and Catholicism. Historically, however, Catholics kneeled and Jews raised their hands. Members of the Islamic faith may kneel on prayer rugs[;] . . . [f]or Quakers silence itself is prayer.

May v. Cooperman, 572 F. Supp. 1561, 1569 (1983), *aff'd*, 780 F.2d 240 (3d. Cir. 1985), *juris. postponed sub nom. Karcher v. May*, 107 S. Ct. 946 (U.S. Jan. 27, 1987) (No. 85-1551).[24]

To bring into the classroom a moment of silence that tends to facilitate (if not encourage) Christian prayer is more than simply offensive and unfair to non-Christians; and it does not "put[] religion on a wholly voluntary basis." Brief for the United States as Amicus Curiae at 21. Instead, it will often subtly pressure many non-Christian students to conform their behavior to the "norm" of Christianity. In the classroom, "[t]he law of imitation operates, and non-conformity is not an outstanding characteristic of children." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring); *accord*, *Duffy*, 557 F. Supp. at 1016 ("As established by Gorden Cawelti, an expert in the fields of curriculum and discipline, children are extremely impressionable and easily influenced").

For example, in a West Virginia schoolroom one Jewish student read a science-fiction book during a moment of silence.[25] In the second period of the day a classmate

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[24] *See* J.A. at 32-33 (Affidavit of Rev. Dr. George Younger), 143-44, 159 (testimony of Dr. Langdon Gilkey).

[25] *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169, 1171 (D. W. Va. 1985) (statute authorized "contemplation, meditation, and prayer").

asked him why he had not been praying during the moment of silence. A second classmate then asked why the Christian student was bothering, because the nonpraying classmate was Jewish and the Jews had murdered Christ. The child felt "hurt, then I felt angry because I didn't think it was fair that he should be able to say things like that during school . . . ." [26] The Jewish student was too frightened of " 'bad publicity' " to tell his teacher.[27]

Similarly, the parent of a New Jersey student stated that she wanted her child to leave the classroom during the moment of silence because she viewed it as prayer in the classroom; but she was "fully aware of the peer pressure placed upon him . . . and . . . sensitive to his feelings that he will be singled out if he does not participate." [28] A Chicago student said that students who did not pray during moments of silence "might be embarrassed. But then they, especially your good friends, would begin to go along with you and pray . . . ." [29]

These examples illustrate the harmful effects of moment-of-silence statutes and their tendency to bring "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion . . . ." *Engel*, 370 U.S. at 431.[30] Such coercive, divisive

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[26] *Id.* at 1172.

[27] *Id.* at 1173.

[28] J.A. at 42, 43 (Affidavit of Rita Rothenberg). *See also* J.A. at 29-30 (Affidavit of Jean Ross).

[29] Rosenbaum, *supra* note 3, at 32. *See also* J.A. at 32-33 (Affidavit of Rev. Dr. George Younger) ("as a practical matter" many students observing statutory moments of silence "will feel compelled to pray").

[30] Moreover, where non-Christian students resist this pressure and use the "moment of silence" for their own chosen form of prayer—which may involve loud noises, gestures, or moving about the room—the teacher then "must either allow such actions or stop them—an untenable and inappropriate responsibility either way." *Hearings, supra* p. 3, at 541 (statement of Ira J. Singer).

influences have no place in our nation's classrooms. Teachers should not be asked to lead and students should not be asked to participate in "moments" that in no way contribute to the mission of our public schools.

Mr. Justice Clark wrote for the Court in *Schempp* that "[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on *the home, the church*, and the inviolable citadel of *the individual heart and mind.*" 374 U.S. at 226 (emphasis added). Yet these moment-of-silence statutes operate to keep religious worship *in the schools* as well, a place where it does not belong and where its effects are detrimental to the educational process. This Court should so rule in this case.

CONCLUSION

For the reasons discussed above, amicus curiae American Association of School Administrators urges this Court to affirm the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* NEW JERSEY EDUCATION ASSOCIATION IN SUPPORT OF APPELLEES

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Parties

Defendants-Appellants in this case are Alan Karcher, who was Speaker of the 200th New Jersey General Assembly, and Carmen Orrechio, who was President of the 200th New Jersey Senate. Plaintiffs-Appellees are students and parents of students in two New Jersey public school districts, and one New Jersey public school teacher, Jeffrey May. The New Jersey Education Association submits this brief as *amicus curiae* in support of the appellees. Hereinafter, defendants-appellants shall be referred to as "appellants"; plaintiffs-appellees shall be "appellees"; and the *amicus curiae* New Jersey Education Association shall be "the NJEA" or "*amicus*".

TABLE OF CONTENTS

	PAGE
Parties	i
Table of Authorities	iii
Interest of *Amicus Curiae*	1
Statement of the Case	3
A. Facts	3
B. Procedural History	4
C. The District Court's Decision	6
D. The Court of Appeals' Decision	7
Summary of Argument	8
ARGUMENT:	
POINT I—The MOS is an unconstitutional abridgement of the Establishment Clause because the purported "secular legislative purpose" is no more than a sham and the true purpose is entirely religious	9
POINT II—The MOS unconstitutionally abridges the Establishment Clause because it has a primary effect of both advancing and inhibiting religion	19
Conclusion	23

PAGE

Table of Authorities

Cases Cited

Abington School District v. *Schemp*, 374 U.S. 203 (1963) 9, 12

Committee For Public Education v. *Nyquist*, 413 U.S. 756 (1973) 19

Engle v. *Vitale*, 370 U.S. 421 (1962) 9

Epperson v. *Arkansas*, 383 U.S. 95 (1968) 11-15, 18-21

Everson v. *Board of Education*, 330 U.S. 1 (1947).... 9

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1970) 14

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 7, 8, 10-12, 15, 19, 20

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 11

Marsh v. *Chambers*, 463 U.S. 783 (1983) 12

McCollum v. *Board of Education*, 33 U.S. 203 (1948) 22

Stone v. *Graham*, 449 U.S. 39 (1980) 11,12

Tilton v. *Richardson*, 403 U.S. 672 (1971) 21

United States v. *O'Brien*, 391 U.S. 367 (1968) 12

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 8, 10-13, 19-21

United States Constitution Cited

First Amendment 4

Establishment of Religion Clause 4

Fourteenth Amendment 4

Due Process Clause 4

PAGE

Statutes Cited

N.J. Stat. Ann. §18A:36-4 (West Supp. 1986) 2, 10

42 U.S.C. §1983 4

42 U.S.C. §2201 4

42 U.S.C. §2202 4

Rule Cited

Federal Rule of Evidence 803 (24) (Best Evidence Rule) 14

Other Authority Cited

Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence In The Public Schools*, 96 Harv. L. Rev. 1874 (1983) 9, 12

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BRIEF OF *AMICUS CURIAE* NEW JERSEY EDUCATION ASSOCIATION IN SUPPORT OF APPELLEES

Interest of Amicus Curiae

The New Jersey Education Association ("NJEA") is the primary professional organization in the State of New Jersey for certified teachers and other instructional personnel, with a membership far exceeding 100,000. In its role as an economic organization, it is the parent organization for the vast majority of local collective bargaining units in New Jersey. Simply stated, the NJEA is the predominant professional and economic representative of the teachers in New Jersey, and its goal and purpose is to serve their professional and economic interests.

As part of this purpose, and throughout its history, the NJEA has involved itself in legal matters and judicial proceedings, both by funding local association actions and by direct participation. In numerous cases the NJEA has presented to the judiciary its position on various legal issues of import or concern to teachers and the educational community. Oftentimes this involvement has been in the form of appearing as an *amicus curiae*. Indeed, in the instant case the NJEA was an *amicus* before both the district court and court of appeals. The NJEA wishes to continue in that status, and has submitted to the Clerk of the Court, simultaneously with the filing of this brief, letters of consent by the parties.

The concern of the NJEA in this case is self-evident from a reading of the statute at issue. As will be explicated more fully below, the statute involved mandates "teachers" to allow students to observe a minute of silence for private contemplation or introspection. N.J. Stat. Ann. §18A:36-4 (West Supp. 1986). The decisions below explain in some detail the direct and primary role to be played by teachers in carrying out the requirements of the statute, should it be upheld by this Court. Obviously, as the group charged by the Legislature with enforcing the statute, the teachers have a substantial interest in the constitutionality of the statute.

For these reasons the NJEA respectfully submits this brief as an *amicus curiae* in this case. This brief is submitted in support of the position of the appellees and in favor of the decisions below holding the statute to be unconstitutional.

Statement of the Case

A. Facts

On December 16, 1982, a Moment of Silence ("MOS") bill was enacted in New Jersey. The enactment was perfected through an override of Governor Kean's veto. (JA. 388, 391). This statute is the latest in a long series of bills introduced or enacted by the Legislature but vetoed by three successive governors of both parties (JA. 381, 394-99).

The December 16, 1982 enactment of the MOS was preceded by extensive debate in both houses of the New Jersey Legislature. It attracted extensive media coverage in New Jersey and in the neighboring states of New York and Pennsylvania (App. Vol. V).[1] All of the debates and all of the newspaper coverage of the MOS centered on the legislators' pronouncements that they wished to encourage prayer in public school. In addition, a number of articles focused on responses to the bill issued by the Governor, teachers, school administrators, students and the public. These articles focused almost exclusively on the religious motivations for the bill's enactment, and differed only in either opposing or favoring that motivation (PE 21-36).

After the bill's enactment, the New Jersey Department of Education distributed the MOS to the various school

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[1] Because of size, the extensive newspaper coverage of the MOS that was introduced at trial could not be reproduced. It is found in the Appendix filed with the Court of Appeals at Volume V. For easier reference, specific articles referred to in this appendix will be denoted by reference to the Exhibit number given to them at trial, *e.g.*, "PE 1".

districts without issuing any regulations or guidelines for its implementation (JA. 22-23). Some school districts, including the Edison School District, implemented the MOS immediately, and students, parents, and one teacher initiated the instant suit, challenging the constitutionality of the legislation.

B. Procedural History

On January 10, 1983, plaintiffs brought suit against the Commissioner of the Department of Education, the New Jersey Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education under the provisions of 42 U.S.C. §1983 and §§2201 and 2202 for declaratory and injunctive relief. Appellees contended that the MOS violates the Establishment Clause of the First Amendment and the Due Process provision of the Fourteenth Amendment in the Constitution of the United States, and provisions of the New Jersey Constitution.

The United States District Court issued a Temporary Restraining Order based upon appellees' showing of the Legislature's religious motivation for the enactment of the MOS (JA. 50). This Order concluded that, while the MOS was neutral on its face, the improper legislative purpose in passing the bill supported the issuance of restraint.

On January 18, 1983, the district court, with the consent of the appellees, allowed the intervention of: Alan J. Karcher, Speaker of the General Assembly; Carmen Orrechio, President of the New Jersey Senate; the New Jersey General Assembly and the New Jersey Senate

(JA. 53).[2] Thereafter, a hearing on the merits was scheduled.

During discovery, appellees attempted to discover from the legislators/intervenors the motivation behind the enactment of the MOS. Since there was no transcription or other official record of legislative debates, appellees attempted to verify whether written and eyewitness accounts of these debates were accurate. They also attempted to have the legislators express their motives for enacting the bill and disclose documents relied on or reviewed in considering the current law and its predecessors.

In response to this effort to ascertain the legislative motivation behind the MOS, the appellants moved for an order suppressing discovery (JA. 58). The district court decided that it would be inappropriate to require legislators to testify concerning their legislative activity, even when the legislative purpose is directly in issue. The trial court did, however, permit introduction of a comprehensive set of newspaper articles, editorials, and citizens' letters concerning the MOS' passage and implementation. Contrary to appellants' assertions, these articles constitute a comprehensive compilation of articles from numerous sources providing an extensive review of the entire legislative process and the public's perception of and reaction to it (JA. 120).

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[2] Both the Senate and General Assembly have decided not to press this appeal. Mssrs. Karcher and Orrechio contend that, as representatives of a legislative body that no longer exists, they have standing to pursue this matter. This brief does not address that issue, but the NJEA supports the arguments of appellees that Karcher and Orrechio lack standing.

C. The District Court's Decision

At the trial on the merits, the appellees produced evidence of: prior bills introduced by many of the same legislators who sponsored the MOS; the newspaper articles, editorials and citizens letters; affidavits of appellees; opposition positions of education associations (JA. 284-300; 375-380; 403); parent and student reaction to the statute (JA. 23-46; 227-260); opinions on the law's lack of educational utility (JA. 38-41; 188-226; 238-39; 301-312); and descriptions as to how the MOS had been implemented in the classroom (JA. 24-27).

The appellants produced no evidence of their own concerning any purported secular purpose for the MOS. Instead, they introduced evidence as to how there might be a useful secular purpose for a moment of silence in the abstract (JA. 313-326; 352-360). They also introduced evidence relating to how the MOS was implemented in Sayreville, New Jersey (JA. 327-332; 333-350) and one expert's testimony on the difficulty of accurately assessing public opinion from newspapers (JA. 361-366).

The district court concluded that the MOS was unconstitutional. On October 24, 1983 the district court granted appellees' request for a permanent injunction. 572 F. Supp. 1561 (D.N.J. 1983) (JSA. 62a-100a). The district court specifically found that the Legislature had no *bona fide* secular purpose in enacting the MOS (JSA 94a). Further, the court found that the MOS both advanced and inhibited religion in contravention of the First Amendment. The district court's decision was appealed by appellants to the Court of Appeals for the Third Circuit.

D. The Court of Appeals' Decision

A divided panel of the Third Circuit affirmed the decision of the district court. 780 F. 2d 240 (3d Cir. 1985). The circuit court rejected the district court's findings under the "effect" and "entanglement" prongs of the *Lemon* v. *Kurtzman* test, but upheld the trial court's decision regarding the Legislature's improper religious motivation. 780 F. 2d at 247-53. The circuit court reviewed all of the evidence submitted to the district court and concluded that there was ample evidence to support the district court's findings of fact with respect to the legislative purpose behind the MOS.

Judge Becker, in dissent, employed a novel test which granted an extraordinary presumption of legitimacy to the MOS, and after disallowing much of appellees' evidence, held that the appellees did not meet their burden in overcoming this "presumption". 780 F. 2d at 256-66. Further, the dissent objected to the standard of review used by the majority in reviewing the trial court's findings of fact. *Id.*

The appellants then appealed to this Court. This Court has ruled that it will hear argument concerning appellants' standing at the same time it hears arguments on the merits.

Summary of Argument

This case centers on the constitutionality of New Jersey's Moments of Silence statute. This statute must be judged under the three pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), wherein the Court interpreted the Establishment Clause to require: a sincerely held secular legislative purpose for a statute's enactment; a primary effect that does not advance or inhibit religion; and an avoidance of excessive entanglement with religion. *Id.* at 612-13.

The district court held, and *amicus* contends, that there was no *bona fide* or sincere secular legislative purpose for the enactment of this statute and that the genuine and primary purpose of the statute was religious. Contrary to appellants' assertions, (Appellants' Brief at 11-12), this is not a "straightforward moment of silence" law. This Court requires a sincere secular motive for the enactment of any legislation which implicates religion. The evidence in this case shows that there was no genuine or real secular motive. This legislation was simply a transparent effort to circumvent this Court's prior rulings proscribing prayer in public schools.

Amicus also contends that this statute impermissibly advances and inhibits religion. The message clearly received by the public when the legislature enacted this measure was an endorsement of religious worship in schools. This is an impermissible effect. *Wallace* v. *Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). Further, the implementation of the statute has the effect of furthering some religious activity and inhibiting other. The statute therefore does not pass the "effect" test of *Lemon*.

Finally, while the Court of Appeals correctly reviewed all of the evidence before deferring to any findings of fact of the lower court, the standard of review used will not effect the outcome of this case. Under any test the evidence is overwhelming. This statute was passed for an impermisssible religious purpose and has the effect of both advancing and inhibiting religion. The Court should therefore affirm the decision below.

ARGUMENT

POINT I

The MOS is an unconstitutional abridgement of the Establishment Clause because the purported "secular legislative purpose" is no more than a sham and the true purpose is entirely religious.

In 1962 and 1963 this Court sruck down as violative of the Establishment Clause state authorized prayer and Bible reading conducted as a brief exercise at the commencement of the public school day.[3] *Abington School District* v. *Schemp,* 374 U.S. 203 (1963); *Engle* v. *Vitale,* 370 U.S. 421 (1962). At the time there existed no state statutes calling for a moment of silence, whether for prayer or contemplation. Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence In The Public Schools,* 96 Harv. L. Rev. 1874, 1880 (1983) (hereinafter, "*Moments of Silence*"). Yet within several years

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[3] The text of the Establishment Clause reads: "Congress shall make no law respecting an establishment of religion, . . ." It has long been held applicable to the states. *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

a plethora of "moment of silence" statutes were enacted. In New Jersey, enactment was delayed by governors with greater sensitivity to and regard for constitutional concerns. But finally, after fifteen attempts, and in override of yet another gubernatorial veto, the New Jersey Legislature passed a MOS statute requiring teachers to allow students a moment of silence at the beginning of school for contemplation or introspection. N.J. Stat. Ann. §18A:36-4. The legislative history of the MOS, combined with the manifest intent of the legislators who enacted this bill, clearly shows that its primary purpose is religious, and that the asserted secular reason is a sham, proferred solely to distract judicial reviewers. For these reasons, and in view of the improper burdens placed upon teachers as the enforcers of the state-sponsored silence, the *amicus curiae* NJEA requests this Court to affirm the decision below invalidating this law.

This Court has enunciated a tripartite test for evaluating whether a challenged statute is circumscribed by the Establishment Clause. *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). That test, which was recently reaffirmed in *Wallace* v. *Jafree,* 472 U.S. 38 (1985) provides that, to be constitutionally acceptable:

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citations omitted]; finally, the statute must not foster "an excessive government entanglement with religion". [citations omitted] *Lemon,* 403 U.S. at 613.

Each prong of the *Lemon* test must be met for a statute to be constitutionally acceptable. Failure to meet any one

of the three criteria is sufficient grounds for concluding that the statute is unconstitutional. *Wallace,* 472 U.S. at 68 (O'Connor, J., concurring); *Stone* v. *Graham,* 449 U.S. 39, 40-41 (1980). The MOS is violative of at least two of the three criteria enunciated in *Lemon.* Therefore, both courts below were clearly correct in permanently enjoining the enforcement of the statute.

The first prong of the *Lemon* test requires that the actual legislative purpose for the enactment of a statute must be clearly secular in nature. *Lemon,* 403 U.S. at 613; *Wallace,* 472 U.S. at 56-57. The mere assertion of a purported secular purpose is not enough for a legislature to meet the purpose inquiry, for the Court must determine if the purpose proffered by the legislature is a sham: a law will not pass constitutional muster if the secular purpose articulated by the legislature is not genuine or is merely a sham. *Wallace,* 472 U.S. at 64 (Powell, J., concurring). See also *Stone* v. *Graham,* 449 U.S. at 41 (rejecting as "self-serving" an assertion of a secular purpose); *Epperson* v. *Arkansas,* 383 U.S. 95 (1968).

Of course, it is the judicial branch of government that is charged with determining the constitutionality of statutes, *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), and it is the judicial branch of government, and ultimately this Court, that must examine the record and determine if the purported legislative purpose is in fact a sham. *Wallace,* 472 U.S. at 75 ("I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one". (O'Connor, J., concurring)).

The federal courts, therefore, must look past the facade presented by a legislature and canvas the available indicia

of intent.[4] This Court has used the historical setting preceding the enactment of legislation, legislative debates, accounts of the intent of the legislature and public reaction to legislation as indicia of the true intent of a legislature when it enacted a challenged statute. An examination of each of these indicia can only lead to one conclusion—the legislative purpose behind the enactment of the MOS was the reintroduction of prayer and religious worship into public schools, a purpose proscribed by the First Amendment. *Schempp,* 374 U.S. at 222-23.

The historic backdrop to the enactment of a statute can provide a reference and understanding of the setting for a statute. *Moments of Silence,* 96 Harv. L. Rev. at 1879-80. The Court has used this setting in examining a statute's words and in reviewing legislative history to develop a thorough understanding of the legislaive intent. For example, in *Marsh* v. *Chambers,* 463 U.S. 783, 790 (1983) the Court reviewed the circumstances surrounding the enactment of the First Amendment in deciding the intent of Congress composed of some of the same members.

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[4] The Appellants, relying on *United States* v. *O'Brien,* 391 U.S. 367 (1968) would have the Court look no further then the face of the statute. This reliance is clearly mistaken. *O'Brien* involved the regulation of the selective service system and its impact on freedom of speech. This case involves the proscriptions of the Establishment Clause, which this court has consistently held to require proof of a secular motive. *Lemon, Epperson, Wallace, supra.* Limiting the inquiry to whether the legislature's attorneys could conjure up and advance a secular purpose when a statute is challenged would simply be an abdication of this Court's responsibility regarding the enforcement of the Constitution. This Court has not hesitated to look behind a purported secular legislative purpose in deciding whether a statute is in conflict with the Establishment Clause. *Stone,* 449 U.S. at 41.

In *Epperson,* 393 U.S. at 108 n. 17, the Court inferred the religious intent behind a statute outlawing the teaching of evolution from, *inter alia,* its proximity to the Scope's Monkey Trial. Similarly, in *Wallace* the Court viewed a statute in the context of prior statutes passed by the state legislature in prior years. *Wallace,* 472 U.S. at 58. The historic setting for the MOS was reviewed thoroughly by the district court and it reveals the true religious purpose of MOS.

The record of the introduction and attempted enactment of bills similar to the MOS is telling. The MOS is simply the latest in a long series of legislative attempts to circumvent or evade the Supreme Court's pronouncements regarding prayer in public schools. Between 1970 and 1980, no fewer than fifteen bills were introduced regarding prayer and/or silent meditation in public schools. These bills ranged from proposals to allow "silent meditation" in schools (Bills S-3024, S-51, A-72 and A-276) to proposals allowing silent prayer or meditation (Bills A-597, A-133, A-373) to attempts to permit vocal prayer (Bills S-1296, A-1028), to a resolution to amend the First Amendment regarding prayer in public schools (Bill A-2997). A number of these bills were passed by the Legislature, but were vetoed by governors who recognized the improper motives of the Legislature (JA. 381, 394-99).[5]

Faced with this history, the appellants introduced *no* evidence purporting to show that the motivation behind *any* of the prior bills was anything but the advancement of religion. This historic context for the MOS points only

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[5] The existing MOS was vetoed because Governor Kean recognized that the motivation behind its enactment was the reintroduction of prayer in public schools. J.A. 381.

to a prohibited religious motivation for the enactment of this MOS.

The legislative debates surrounding the enactment of the MOS corroborate its religious genesis. This legislative debate is patently relevant. This Court has consistently reviewed the debates and proceedings surrounding the enactment of a statute when attempting to assess the true intent of the lawmakers.[6] Unfortunately, the State of New Jersey does not transcribe its legislative debates, so the district court properly canvassed all other available evidence of the legislative history in furthering its proper and traditional inquiry into the legislative motive for the MOS.[7] In so doing, the district court was following a

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[6] Appellants would prohibit a canvassing of the legislative views as either an improper intrusion into the domain of the legislature or as an examination of subjective views of individual legislators. Both of these arguments must fail. As already noted (supra, n. 2), when the issue in a case is whether the legislative purpose is compatible with the Establishment Clause, the Court has never refused to look behind a purported secular purpose advanced in support of a statute. The second argument is slightly more sophisticated, but still must be rejected. Short of canvassing the views of each and every legislator, the only method the Court can use in determining legislative intent is the debates and statements of the legislators sponsoring and supporting a bill. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434-36 (1970); *Epperson* v. *Arkansas*, 383 U.S. 95, n. 16 (1968). Appellants' contention that the use of this evidence is not probative of the legislative purpose is simply not supported by the long history of this Court's reliance upon legislative debates in culling the intent of a legislative body.

[7] Appellants, citing "the Best Evidence Rule," Rule Fed. R. Evid. 803 (24), contend that the trial court erred in admitting numerous newspaper articles into evidence. This argument is, at best ingenuous.

(Footnote continued on following page)

long line of Supreme Court cases in which the Court has looked to testimony and accounts of legislative deliberations when a transcript of those deliberations is not available.

For example, in *Epperson*, 393 U.S. at 108 n. 16, the Court not only looked to newspaper advertisements utilized by the bill's proponents, but also considered letters to editors written by members of the public probative of legislative intent.

Thus the district court's review of memoranda, eyewitness accounts and newspaper articles concerning the legislative debates was neither novel nor unwarranted. It was properly assessing the only available record of the legislative history so that it could properly make an independent determination concerning the collective legislative motive for the enactment of MOS. Any other course would have been an abdication of the court's responsibility to properly apply the purpose prong of the *Lemon* test.

(Footnote continued from preceding page)

The best evidence of what transpired during the legislative debates is, of course, the testimony of the legislators themselves. They, however, refused to testify, claiming legislative privilege. Now, having prevailed on their claim of legislative privilege, appellants would exclude the written accounts of those debates as reported in newspapers. In this way, the legislators, who seek to assert a putative, if *post hoc*, "secular" purpose, hope to exclude all evidence of their true purpose. This would effectively prevent the Court from fulfilling its proper judicial review of the issues in this case. The Court has previously looked to newspaper advertisements, editorials and letters to newspapers in determining the true legislative purpose of suspect legislation. *Epperson*, 393 U.S. at 108 n. 16. There simply is no reason for the Court to refrain from similarly reviewing the newspaper articles, editorials and letters in this case.

Once the district court examined the evidence concerning the legislative history of the MOS, the outcome was obvious. The paramount purpose for the introduction and enactment of the MOS was the reintroduction of prayer into the New Jersey schools. The evidence presented—the eyewitness accounts, the newspaper articles and the statement of the bill's prime sponsor—leaves no doubt but that this bill was religiously motivated and that the Legislature had no true secular purpose for its enactment.

The most comprehensive reports on these debates are contained in the dozens of newspaper accounts of the legislative sessions. Contrary to appellants' assertions, those acounts are not isolated or fragmentary reports, but are an exhaustive compilation of articles from numerous papers covering all of the legislative debate and the public's reactions to them. Individually, each and every article and editorial recognizes the entirely religious motives of the bill's sponsors and supporters. Cumulatively, the evidence is overwhelming. The legislative purpose for MOS is the circumvention of the Supreme Court's prior pronouncements concerning the Establishment of Religion Clause.

The bill's supporters in the state Senate had this to say on its behalf: "Maybe in the future they [the Supreme Court] will say prayer is one thing and separation of church and state is another". (Senator Pollack, Quoted in Trenton Times, PE 13). This bill would bring "prayers back into school through the front door". (Senator Orrechio, Asbury Park Press, PE 9). The founding fathers are "spinning in their graves" at seeing how the Establishment Clause has been "twisted". (Senator Kennedy, Asbury Park Press, PE 9).

The debate in the Assembly also centered exclusively on how this bill could be used as a vehicle for reintroducing prayer in public schools. Senator Adubato opined: "Prayer never hurt anyone". (Courier—Post, PE 5), and "When I vote for this override, I'll be saying 'Thank You' to the parochial schools and 'Thank You' to God". (Trenton Times PE 3). "I would like to see prayer in school and I admit it." (Star Ledger, PE 2). Similarly, Assemblyman Wolf stated: "It's a prayer". (Star Ledger, PE 2).

Perhaps the most telling evidence of the legislative purpose comes from the bill's prime sponsor, Assemblyman Zangari, who had sponsored numerous other predecessor bills providing for prayer in schools. Those that were passed were vetoed. This time around, he specifically tailored the bill to circumvent this Court's rulings on the subject. In committee hearings Mr. Zangari noted that he deleted all reference to prayer and had reduced the bill to 54 words. (JA. 405). This attempt to undermine the constitutional pronouncements of this Court is apparent in Mr. Zangari's speeches. In his presentation of the bill in Committee, while paying lip-service to a purported secular purpose, he was concerned primarily with prayer. (JA. 225-27, 229-30; 405). His debate before the Assembly is equally telling. Referring to the prayer held to open the legislative sessions, he stated: "If it's good for all the grown-ups, why shouldn't it be good for my grandchildren?" (Zangari, Philadelphia Enquirer, PE 8).

The legislative history is clear. Apart from one attempt to mask the bill's purpose with a secular aūra, there was only one truly acknowledged legislative purpose for the enactment of MOS: the reintroduction of prayer in public schools. The purported secular purpose advanced by the

legislature, a "transition" into the school day, is belied by the lawmakers own statements in the debates surrounding the passage of this act. It is also belied by the fact that teachers simply do not need a state-sponsored minute of silence in order to achieve any pedagogical purpose; teachers already possess the power to impose one minute or thirty minutes of silence in any classroom.

The historical background preceding the debates points toward the wholly religious motivation behind the MOS. The legislative debates confirm this. Finally, an examination of the public's perception of the Legislature's purpose in enacting MOS reveals that everyone—all newspapers, all correspondents, all of the members of the general public who followed these debates— knew that the purported secular purpose was nothing more than a sham.[8] Every single letter to the newspapers, whether pro or con, recognized the true, and truly religious, legislative purpose. Every editorial and commentary knew the actual motive behind this enactment. Without exception, each of the dozens of comments characterized the MOS as a transparent attempt to circumvent the Constitution and reinstate prayer in public schools.

Both the district court and Third Circuit recognized the religious motivation behind the MOS. Both courts specifically found that the purported secular purpose advanced by the legislature in support of the MOS was, and is, a sham. 780 F. 2d at 251-52; 572 F. Supp. at 1571. These determinations, under any standard of review, are

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[8] In *Epperson*, the Supreme Court looked at the "many letters to newspapers by members of the public indicative of the public perception that the bill's primary purpose was religious . . ." 393 U.S. at 108 n. 16.

clearly correct, for the evidence is compelling. The historic background shows that the MOS was simply the latest in a series of measures designed to get prayer back in schools. The legislative history documents the religious motivation of the collective legislative body. Finally, the public perception confirms that all responsible observers recognized the wholly religious nature of the legislative intent in enacting MOS. Since the MOS was enacted with a prohibited legislative religious purpose, it must be struck down as unconstitutional. *Wallace,* 472 U.S. at 56.

POINT II

The MOS unconstitutionally abridges the Establishment Clause because it has a primary effect of both advancing and inhibiting religion.

The second prong of the *Lemon* test requires the Court to determine if the challenged statute has "a primary effect that neither advances nor inhibits religion." *Committee For Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973). "The relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statue, would perceive it as a state endorement of prayer in public schools. *Wallace,* 472 U.S. at 69 (O'Connor, J., concurring). See also *Epperson,* 393 U.S. at 106-07. The district court found, and the evidence clearly shows, that the predominant effect of the MOS is the advancement and inhibition of religion and religious beliefs. Therefore, this Court should find that it is impermissible under our Constitution.

To be sure, the Third Circuit found the MOS to be a legitimate time, place and manner restriction on religious observance. 780 F. 2d at 249. Putting aside for a moment the lack of any need for a state law in order for a teacher to impose a moment of silence in a classroom, it may be that, in the abstract, a moment of silence in school is a defensible time, place and manner restriction. But here there was no abstract statute. Rather, it was a statute imbeded in a concrete history of religious motivation and fully recognized as religious in purpose by the populace. There was a clear and effective message conveyed to the general public and to school children. This moment of silence was meant to advance Christian religious worship in schools. Further, this legislation would inhibit other religious practices. Accordingly, the Court of Appeals holding on this point should be reversed.

The district court did not base its finding that the MOS failed the effect prong of the *Lemon* test on the perceptions of observers. However, it is an important basis for invalidating the statute. See *Epperson*, 393 U.S. at 108. See also *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring). As fully explicated in Point I, the whole purpose for enacting the MOS was to reestablish religious worship in the classroom. The New Jersey Legislature wanted to send a message to the students and populace of New Jersey: We support and encourage prayer in school. This message, which was evident in the legislative debates, in the historical setting for the debates, and in the language of the bill itself, was received by the students and the New Jersey general public. It was received loud and clear. Dozens of editorials were written on the MOS, *all* of which centered on the encouragment of prayer in classrooms. Dozens of

letters to newspapers were documented. All of these concerned prayer in the classroom. Students teachers and administrators who were interviewed by reporters knew of the legislative purpose. (See PE 31, 32, 33).

There is simply no contesting that any person who was aware of the statute was aware that New Jersey had passed a law with the express purpose of encouraging religion. This is a prohibited effect. *Wallace,* 472 U.S. at 69 (O'Connor, J., concurring); *Epperson,* 393 U.S. at 107-08.

The MOS has a prohibitive religious effect for another reason. Credible testimony at trial indicated that the MOS, at least as implemented in some school districts, required coerced group activity in which various outward manifestations of prayer were exhibited. Students were told to remain quiet, close their eyes, bow their heads or otherwise engage in conduct that closely resembles traditional Christian prayer (JA 329-31). This, coupled with the clear religious message sent by the Legislature, inescapably leads to the conclusion that the statute advanced the practice of religion in schools.

This conclusion is particularly compelling in light of the fact that the practice is required of malleable and impressionable school children. This Court has consistently recognized that students are extremely vulnerable to pressures from both their teachers and their peers. *Tilton* v. *Richardson,* 403 U.S. 672 (1971). The exercise involved in the moment of silence is closely akin to that which many students experience at home when they are trained by their parents to pray before going to bed or in Church when silent prayer is conducted. This connection is compounded when the teachers instruct the students to bow their heads or shut their eyes or partake in some other

practice closely associated with religious worship. *McCollum* v. *Board of Education*, 33 U.S. 203 (1948). Plainly the MOS clearly advances religious worship in the classroom.

The MOS also inhibits some in the practice of their religious beliefs. A number of witnesses indicated that coerced prayer, or its outward manifestations, effectively nullifies and drains traditional religious services of vitality. Many people view mandated group activity, in which prayer is a dominant purpose, as emasculating such a process of all meaning.

Similarly, the testimony adduced at trial indicates that the MOS inhibits modes of prayer of various religious groups. Even if it were legitimately designed to provide students with an oportunity to pray, at least some students could not do so because the statute does not permit the physical behavior required by their religious beliefs. The Moslem, who must kneel and cry aloud to Allah, would not be able to participate in the religious observance and, indeed would feel ostracized because of his religious differences. Finally, the MOS would violate the beliefs of those individuals who profess no acknowledgment of a deity, but who have heard the Legislature's clear message and are forced to sit quietly and participate in conduct which certainly mirrors the traditional posture of prayer.

The effect of the MOS is to both advance and inhibit religion. All observers of the legislative debates recognized and responded to the uniquely religious message contained in the MOS. It has been implemented in such a way as to both advance and inhibit religion. Accordingly, the district court was correct in finding that the MOS violated the Establishment Clause.

CONCLUSION

In light of the foregoing, it is manifestly apparent that the Monment of Silence Statute enacted in New Jersey in 1982 was religiously motivated, lacked any sincere or *bona fide* secular purpose, and had the effect of advancing and inhibiting religion. For these reasons it is clear that the statute contravenes the Establishment Clause of the First Amendment of the Constitution. Accordingly, the decisions below, finding the statute unconstitional, should be affirmed.

Respectfully Submitted,

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No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER,

Appellant,

v.

JEFFREY MAY, Et al.,

Appellees.

On Appeal From The United States Court Of Appeals For The Third Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE APPELLANT DOES NOT HAVE STANDING TO BRING THIS APPEAL	4
II. THE PROPOSED INTERVENORS-APPELLANTS ALSO LACK STANDING TO MAINTAIN THIS APPEAL	7
III. THE NEW JERSEY MOMENT OF SILENCE LAW ON ITS FACE BELIES THE ASSERTED PEDAGOGICAL LEGISLATIVE PURPOSE	10
IV. THE NEW JERSEY MOMENT OF SILENCE LAW GOES BEYOND THE BOUNDS OF PERMISSIBLE ACCOMMODATION OF RELIGION AND ACTS AS AN ENDORSEMENT OF PRAYER	13
A. Accommodation Aimed At Lifting Government Placed Burdens On Free Exercise Are Permissible	14
B. No Burden On Silent Prayer Existed Prior To The Enactment Of The New Jersey Moment Of Silence Law	16
C. The Message Conveyed By The New Jersey Moment Of Silence Law Is One Of Endorsement Of Prayer	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Baker v. *Carr*, 369 U.S. 186 (1962)	5
Barnes v. *Kline*, 759 F.2d 21 (D.C. Cir. 1985)	5
Bender v. *Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326 (1986)	3, 5
Braunfeld v. *Brown*, 366 U.S. 599 (1961)	15
Daughtrey v. *Carter*, 584 F.2d 1050 (D.C. Cir. 1978)	3, 5
Diamond v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986)	3, 8
Donaldson v. *United States*, 400 U.S. 517 (1971)	7
Goldwater v. *Carter*, 617 F.2d 697 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979)	6
Grand Rapids School District v. *Ball*, ___ U.S. ___, 105 S.Ct. 3216 (1985)	2, 19
Harrington v. *Bush*, 553 F.2d 190 (D.C. Cir. 1977)	6
Immigration and Naturalization Service v. *Chadha*, 462 U.S. 919 (1983)	4
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	2, 11, 17
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	4, 19
May v. *Cooperman*, 572 F.Supp. 1561 (D. N.J. 1983)	*passim*
May v. *Cooperman*, 780 F.2d 240 (3d Cir. 1985)	*passim*
Moore v. *United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984)	5
Riegle v. *Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981)	5
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	7
United States v. *SCRAP*, 412 U.S. 669 (1973)	9
Wallace v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985)	*passim*
Walz v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970)	15
Wisconsi v. *Yoder*, 406 U.S. 205 (1972)	15
Zorach v. *Clausen*, 343 U.S. 306 (1952)	17

TABLE OF AUTHORITIES

CONSTITUTION:
United States Constitution
Amendment One..... *passim*

STATUTES AND RULES:
N.J.S.A. 18A:36-4..... *passim*
F. R. Civ. P. 24(a)..... 3, 7, 8

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICI CURIAE

Americans United for Separation of Church and State (Americans United) is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United has over 40,000 members of various religious persuasions and some without an identification with any religious community. Its members are located in all states of the nation including the State of New Jersey.

Americans United is involved in extensive litigation of First Amendment Establishment Clause issues throughout the United States. Since 1947 it has been involved in a large portion of the Establishment Clause cases coming before this Court dealing with the application of the Establishment Clause of the First Amendment, including such noteworthy cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); and *Grand Rapids School District* v. *Ball*, 105 S.Ct. 3216 (1985).

Americans United has a particular interest in the issues raised in this case because of its concern with the attempt to use state and local governments to convey a message that religion or a particular religion is favored by the state. Americans United believes that the role that all governments must play is one of neutrality concerning religious affairs. The separation of church and state is vital to the health of our nation.

Council on Religious Freedom Council is a nonprofit corporation founded to uphold and promote the principles of religious liberty with particular emphasis on the free exercise of religion.

The Board of Directors of the Council and its membership are composed of individuals who are active in religious affairs, some in an official capacity and others on a lay basis, but all recognizing the importance of preserving the religious neutrality of the public schools of our

nation. The Council believes that when the public schools attempt, either by direct involvement or by subtle encouragement, to bring religion into the formal school day the result can only be the trivializing of religion.

SUMMARY OF ARGUMENT

Amici curiae believe that this Court lacks jurisdiction to hear this appeal because Assemblyman Karcher lacks standing to bring it in the face of a decision by the New Jersey Legislature not to pursue this appeal. Members of collegial bodies lack standing to perfect appeals that the body has declined to bring. *Bender* v. *Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326 (1986). Assemblyman Karcher has no individual interest in the outcome of this case. *Daughtrey* v. *Carter*, 584 F.2d 1050 (D.C. Cir. 1978).

The proposed intervenors-appellants also lack standing under Article III of the United States Constitution and do not meet the requirements for intervention under Fed. R. Civ. P. 24(a). The intervenors do not assert a legally protected interest. They assert no right affected by the outcome of this case. Their only interest is the maintenance of a legislative scheme with which they agree. Such an interest is clearly insufficient to confer standing. *Diamond* v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986).

Should the Court decide that it has jurisdiction, the decisions below should be affirmed, although some of the analyses used to reach those decisions was faulty. The educational purpose for the New Jersey moment of silence law asserted at trial is not plausible considering the language of the statute. The language, along with other factors, indicates a purpose to accommodate silent prayer. However, since no burden on that particular form of religious expression existed, the purpose of the statute

can only be the endorsement of that religious practice. The statute gives a message of endorsement of prayer. This result, intentional or not, violates the Establishment Clause. *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

ARGUMENT

I. THE APPELLANT DOES NOT HAVE STANDING TO BRING HIS APPEAL.

Amici curiae believe that this Court lacks jurisdiction to hear this appeal. None of the originally-named defendants contested the claims of the plaintiffs in the trial court. *May* v. *Cooperman*, 572 F.Supp. 1561, 1563 (D. N.J. 1983). The attorney general of New Jersey, who under New Jersey law would normally be responsible for defending the named defendants, Commissioner of Education and Department of Education, refused to defend the constitutionality of the New Jersey moment of silence law, N.J.S.A. 18A:36-4. *May* v. *Cooperman*, 780 F.2d 240, 242 (3d Cir. 1985). None of the named defendants seek review in this court.

The Speaker of the New Jersey General Assembly, the New Jersey General Assembly, the President of the New Jersey Senate, and the New Jersey Senate intervened in the trial court to defend the constitutionality of the statute. 780 F.2d at 242.

This Court ruled in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 940 (1983):

> We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.

Under this ruling, the New Jersey General Assembly and Senate were proper parties to intervene and defend the constitutionality of New Jersey's moment of silence law. Neither of these parties seeks review in this Court (Appendix to Appellees' Motion to Dismiss or Affirm at 1a).

Review in this Court is sought only by Alan Karcher, the former Speaker of the General Assembly and now the minority leader. Assemblyman Karcher has no standing to appeal to this Court. In *Bender* v. *Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326, 1333 (1986), this Court held, "Members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." In that case, a district court declared a school board action unconstitutional. The school board voted 8 to 1 not to appeal. The dissenting member of the board filed an appeal. This Court ruled that he had no standing to perfect that appeal. The situation here is directly analogous.

Further, Assemblyman Karcher, individually, does not have the required personal stake in the outcome of this suit. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). "Although injuries suffered by legislators may be different from those of other litigants, the manner of analyzing such injuries for standing purposes is the same." *Daughtrey* v. *Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978). Individual legislators have been found to have standing only in those cases where they allege an injury to the effectiveness of their constitutionally mandated role in the lawmaking process. *See*, e.g., *Barnes* v. *Kline*, 759 F.2d 21 (D.C. Cir. 1985) (improper pocket veto); *Moore* v. *United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984) (failure of revenue measure to originate in the House); *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873

(D.C. Cir. 1981) (circumvention of Senate's right to advise and consent on executive appointments); *Goldwater* v. *Carter*, 617 F.2d 697 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979) (circumvention of the Senate's right to advise and consent on treaties).

In *Harrington* v. *Bush*, 553 F.2d 190 (D.C. Cir. 1977), the court denied standing to an individual congressman seeking to challenge CIA activity as illegal. The court stated:

> There is no doubt that, as a Congressman, appellant occupies a special relationship to the legislative process. This relationship, however, merely defines his power to act in the process, not the impact of any illegality on his Congressional status.

Id. at 214. Assemblyman Karcher can allege no impact on his power to act in the legislative process. Neither his ability to vote nor the effectiveness of his vote has been diminished. The law was enacted in the normal process. Its constitutionality was challenged in the federal courts, and those courts declared its unconstitutionality all in the constitutionally prescribed manner.

In *Daughtrey, supra*, two congressmen challenged executive action implementing President Carter's pardon of Vietnam era draft resistors as a *de facto* repeal of legislation. The court ruled that they had no greater interest in the enforcement of existing law than the average citizen. Just as the congressmen in *Daughtrey* were not specifically injured by non-enforcement of a statute, Assemblyman Karcher is not injured by a court determination that the statute in question here is unconstitutional. For these reasons, amici curiae believe that the appeal should be dismissed.

II. THE PROPOSED INTERVENORS-APPELLANTS ALSO LACK STANDING TO MAINTAIN THIS APPEAL.

The proposed intervenors-appellants seek to intervene in this Court to defend the constitutionality of New Jersey's moment of silence law and to cure any defects in this Court's jurisdiction caused by the lack of standing of appellant Karcher. Interestingly, although the proposed intervenors assert that they meet the requirements for intervention under F.R. Civ. P. 24(a), they do not make any attempt to assert an independent basis for Article III standing. Such an independent basis is obviously needed if the only appellant presently before the Court lacks standing. It is to cure this lack of standing that intervention is sought. Amici curiae assert that the proposed intervenors lack standing and lack the interest required for intervention under F.R. Civ. P. 24(a).

Since this Court has never ruled on the question of whether or not the interest required for intervention under F.R. Civ. P. 24(a) is sufficient to satisfy Article III standing requirements, we will address these two issues separately. In *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), this Court ruled that F.R. Civ. P. 24(a) required "a significantly protectable interest." This has been interpreted to mean a "legally" protected interest. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985). Although the intervenors express an interest in the issues of this case, it is clearly not legally protected. Indeed, it is much more general and vague than the interest asserted in *Donaldson*. In *Donaldson*, a taxpayer being investigated by the IRS sought to intervene in proceedings initiated by the IRS to enforce summonses issued to third parties having records relevant to the

taxpayer's tax liability. Although the taxpayer faced possible civil or even criminal liability as a result of the IRS investigation, the Court found that his interest was not legally protectable.

In a situation very similar to the one in this case, Justice O'Connor recently discussed the intervention requirements. Like this case, *Diamond* v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986), involved an attempt by an intervenor citizen to invoke this Court's appellate jurisdiction to review a ruling that a state statute was unconstitutional after the state had declined to seek review. In a concurring opinion, Justice O'Connor expressed the view that F.R. Civ. P. 24(a) required at least an interest "sufficient to support a legal claim or defense which is 'founded upon [that] interest' and which satisfied the Rule's commonality requirement." *Id.* at 1711. Justice O'Connor found such an interest lacking because the intervenor asserted "no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this case." *Ibid.* The same could be said for the proposed intervenors here. Under the position they assert, they could neither sue, nor be sued by, anybody on the basis of the Establishment Clause in relation to New Jersey's moment of silence law.

However, the essential question in regard to the proposed intervention is whether the intervenors would possess the requirements for standing under Article III. Under this Court's recent holding in *Diamond* v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986), the intervenors clearly lack standing:

> The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a

> private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club* v. *Morton*, 405 U.S. at 740, in defending the standards embodied in that code.

Id. at 1705.

The intervenors have shown no direct stake in the outcome of this litigation, only a desire that the moment of silence law remain in effect. This Court's jurisdiction is not "a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973).

Intervenors think that a moment of silence has educational value (Motion for Leave to Intervene at iv). The present New Jersey legislature apparently does not agree. *See*, letter of Speaker Hardwick to Director, ACLU, Appendix to Appellees' Motion to Dismiss or Affirm at 8a. This is not a dispute for the courts to resolve. Further, the decisions below and this Court's decision in *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985), clearly do not hold that a neutral moment of silence law with a proper legislative purpose would be unconstitutional. As the intervenors point out in their proposed brief on the merits at page 7, a portion of the evidence at trial

consisted of testimony regarding the operation of a local moment of silence policy that predated the state statute. Obviously, the declaration of this law's unconstitutionality is not a legal barrier to a proper moment of silence policy at the state or local level, and the intervenors' interest in such a policy is not impaired. Intervenors raise no First Amendment free exercise claim. Such a claim would have no merit. *Jaffree*, 105 S.Ct. at 2491, n.45. For these reasons, the proposed intervenors lack the standing necessary to maintain this appeal. Should the Court decide that it does have jurisdiction to review the merits of this case, amici curiae present the following comments on the merits.

III. THE NEW JERSEY MOMENT OF SILENCE LAW ON ITS FACE BELIES THE ASSERTED PEDAGOGICAL LEGISLATIVE PURPOSE.

For the second time in recent years, this Court has been called upon to review a state statute establishing a moment of silence as part of the opening exercises in public schools. Two years ago, the Court struck down Alabama's moment of silence law in *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985). The opinion of the Court in *Jaffree* implied, and the concurring opinions of Justice O'Connor and Justice Powell took pains to acknowledge that it was quite possible that a state could pass a moment of silence statute that would pass constitutional muster.

Although the New Jersey law under review here lacks some of the attributes most troubling in the Alabama statute, amici curiae believe that the New Jersey law in question, N.J.S.A. 18A:36-4, is also unconstitutional.

Although troubled by some of the analyses in the courts below, amici curiae concur with the findings of both the

district court and the court of appeals that the statute lacks a valid secular purpose under the first prong of the test enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). We begin our analysis of the legislative purpose by refuting the secular pedagogical purpose asserted by the intervenor-defendants at trial. This alleged purpose was to provide a transition period that would help to focus students' minds on the educational tasks ahead of them in the school day. *May* v. *Cooperman*, 780 F.2d 240, 244 (3d Cir. 1985).

Justice O'Connor recognized the possible validity of such an educational purpose when she stated in *Jaffree:*

> Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

Wallace v. *Jaffree*, 105 S.Ct. at 2500 (O'Connor, J., concurring).

Amici curiae believe that this statute, on its face, belies any such pedagogical purpose. The statute reads:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

N.J.S.A. 18A:36-4. It is submitted that if the New Jersey legislature had made a determination that a moment of silence at the beginning of the school day had educational

value,[1] it would have mandated such an exercise. At the very least, it would have given principals and/or teachers the discretion to determine whether such an exercise would be of value. But that is not what the law does. This law gives students the discretion to observe a moment of silence and commands teachers and principals to bow to their wishes. The court of appeals was correct in holding that the language of the statute can only be interpreted as making student participation voluntary. 780 F.2d 246. The New Jersey legislative scheme places in students complete discretion in their actions and commands school authorities not to interfere. To accept the proposition that this legislative scheme promotes education would require one to have a strange educational philosophy indeed.

Students most in need of the calming and transitional effect that a moment of private contemplation and introspection might provide cannot be compelled to participate. Teachers, principals, or school boards that see no educational value to the exercise have no discretion to dispense with it, and those who see a value in it cannot require participation. Compare the original moment of silence law in Alabama, the constitutionality of which was conceded by all parties in *Jaffree*, 105 S.Ct. at 2481, n.1:

> . . . The teacher . . . shall announce that a period of silence . . . shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

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[1] Amici do not believe it was proper for the district court to listen to expert testimony on the educational value of a moment of silence and substitute its judgment for that of the legislature or to infer an improper legislative purpose based on experts' views of the value of a moment of silence.

By giving control of the classroom to the teacher, this statute, on its face, evinces a plausible secular purpose. In contrast, students in New Jersey may read, or listen through earphones to radios or tape cassettes, or be excused from class during the minute of silence. 780 F.2d at 254 (Becker, J., dissenting). No plausible educational purpose is served by such activity. Acceptance of the pedagogical purpose asserted at trial would require the willing suspension of disbelief.

IV. THE NEW JERSEY MOMENT OF SILENCE LAW GOES BEYOND THE BOUNDS OF PERMISSIBLE ACCOMMODATION OF RELIGION AND ACTS AS AN ENDORSEMENT OF PRAYER.

Amici curiae believe that the legislative purpose of the New Jersey moment of silence law was the impermissible endorsement of prayer during the moment of silence. It is clear that the legislature intended to establish a period of time during the school day when students would be officially "allowed" to pray.

The bill which became the law under review was the eighteenth in a series of bills attempting for more than a decade to establish a moment of silence or even vocal prayer as part of the opening exercises in New Jersey public schools. *May* v. *Cooperman*, 572 F.Supp. at 1563, n.1. Many of the previous bills were much more explicit in their purpose of providing a period of silent prayer. In 1968, A.640 required teachers to "conduct a brief period of silent prayer or meditation with the participation of all pupils." 780 F.2d at 244. In 1969, A.146 authorized "a brief period of silent prayer or meditation." 572 F.Supp. at 1563. Assemblyman Zangari, the sponsor of the law under review, introduced bills in 1980 that called for a constitutional amendment permitting school prayer and sought to establish daily prayer and scripture reading in

New Jersey public schools, 572 F.Supp. at 1563. Both the district court and court of appeals opinions document in further detail the long history of these legislative endeavors in New Jersey. A history of attempts to return prayer to public schools is relevant to the legislative purpose behind the law finally enacted. *Jaffree,* 105 S.Ct. at 2493 (Powell, J., concurring).

Although it is perhaps more directly related to an inquiry into the primary effect of the statute, the almost universal perception of legislators, educators, students, parents, clergy, and the public that the purpose of this law was to set aside time for prayer is relevant to an inquiry into legislative purpose. The district court opinion documents the perception to this effect of opponents and supporters of the law. The fact that the language of the law allows students complete discretion regarding participation and the fact that school administrators felt compelled to allow objecting students to absent themselves, 572 F.Supp. at 1567, indicates that all concerned believe the exercise has some religious connotation.[2]

A. Accommodation Aimed At Lifting Government Placed Burdens On Free Exercise Are Permissible.

As Justice O'Connor pointed out in *Jaffree*, "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute" is to accommodate religion. 105 S.Ct. at 2504 (O'Connor, J., concurring). Not all actions of the government taken pursuant to religious considerations are unconstitutional. State action moti-

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[2] The district court's reliance on the testimony of interested witnesses as to statements made by some legislators during portions of the floor debate is clearly an improper method of determining legislative purpose.

vated by religious concerns can be divided into three categories.

The first category is action mandated by the Free Exercise Clause. For example, this Court ruled in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), that the Free Exercise Clause required Wisconsin to exempt members of the Amish religion from certain provisions of the state's compulsory education laws. Many states have since adopted amendments to their compulsory education laws generically referred to as "Amish exemptions." The passage of these obviously religiously motivated laws did not violate the Establishment Clause. This case does not involve a claim that the Free Exercise Clause mandated the state action involved. There is no free exercise right to compel the state to set aside time for prayer during the school day. *Jaffree*, 105 S.Ct. at 2491, n.45.

The second category of religiously motivated state action is permissible government attempts to accommodate free exercise values that are not constitutionally mandated. An example of such an action would be the property tax exemption for churches upheld by this Court in the face of an Establishment Clause challenge in *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970). *See* also *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (holding that a state could, but was not required to, exempt Saturday Sabbatarians from Sunday closing laws).

The third type of religiously motivated action is that which is banned by the Establishment Clause as an impermissible advancement or inhibition of religion. One example is the Alabama moment of silence law struck down in *Jaffree*.

The question presented by this case is whether the New Jersey moment of silence statute falls within the

second or third categories. Put another way, "[t]he challenge is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion." *Jaffree*, 105 S.Ct. at 2504 (O'Connor, J., concurring).

Amici curiae believe that Justice O'Connor perceived the correct limit to government efforts to accommodate religion when she stated that such efforts should be directed at lifting government imposed burdens on free exercise. *Ibid.* Justice O'Connor recognized that such a standard would not save the Alabama statute in *Jaffree*. *Ibid.*

B. No Burden On Silent Prayer Existed Prior To The Enactment Of The New Jersey Moment Of Silence Law.

Both Justice Stevens, writing for the majority, and Justice O'Connor pointed out in *Jaffree* that nothing in the Constitution, the laws of Alabama, or any government practice prevented students from voluntarily praying at any time during the school day. *Id.* at 2491, n.45, and 2496 (O'Connor, J., concurring). The situation was the same in New Jersey prior to the enactment of its moment of silence law. This fact was alluded to by Governors Cahill and Byrne when they vetoed previous moment of silence bills. 780 F.2d at 244, 572 F.Supp. at 1563.

Despite veto messages from two consecutive governors that such laws served no useful purpose, and without any assertion that private, silent prayer or contemplation was in any way impeded, the legislature persisted in its efforts and finally established a moment of silence law over the governor's veto. The Court in *Jaffree* refused to assume that the legislative enactment in that case was "nothing but a meaningless or irrational act." 105 S.Ct. at 2492.

Yet, that is exactly what the New Jersey law amounts to unless one acknowledges a legislative purpose to voice the state's approval of prayer in public schools. When a legislature goes out of its way to establish a period during which prayer is "allowed" when there existed no rules or policy that disallowed prayer at that time and place, the undeniable message to the public is that prayer is favored by the state. The Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 2497 (O'Connor, J., concurring).

Not only was there no impediment to silent prayer, there was nothing to prohibit local school boards, principals, or teachers from instituting a moment of silence policy if it was believed to be of educational value. The evidence showed that the Sayreville School District had been conducting a moment of silence since 1969. 572 F.Supp. 1566. Therefore, the state action challenged here is different from that in *Zorach* v. *Clausen*, 343 U.S. 306 (1952). In that case, "[t]he teacher . . . cooperate[d] in a religious program *to the extent of making it possible* for her students to participate in it." *Id.* at 313 (emphasis added).

C. The Message Conveyed By The New Jersey Moment Of Silence Law Is One Of Endorsement Of Prayer.

Justice O'Connor indicated in *Jaffree* that the primary effect prong of the *Lemon* test could "help decide those close cases where the validity of an expressed secular purpose is in doubt." 105 S.Ct. at 2500 (O'Connor, J., concurring). The view that the legislative purpose for the New Jersey moment of silence statute was the endorsement of prayer in the public schools is bolstered by the evidence as to the primary effect of the law. The district

court made findings based upon substantial evidence that the widespread public perception of the purpose of the law was the promotion of prayer.

Both proponents and detractors of the bill saw it as an attempt to reintroduce prayer into public schools. The American Baptist Churches of New Jersey opposed the bill as an "attempt by the state to impose something having the appearance and nature of a religious observance" that would in effect "trivialize" true religion. However, some American Baptist pastors supported the bill as a useful way to bring religion into the schools. 572 F.Supp. at 1565. The New Jersey School Board Association opposed the bill as promoting prayer in school with no educational purpose. A minority within the organization felt that prayer should be returned to the schools. *Ibid.* The New Jersey Education Association perceived the bill to be "a backdoor approach to bringing prayer into the public school." *Ibid.*

The perception among students in school districts around the state as to the religious purpose of the law was similar. In Princeton, the moment of silence was "generally considered a form of prayer which some students opposed and some approved." *Id.* at 1566. In Roosevelt, the testimony showed that most of the students in the 8th grade history class "opposed a moment of silence on the ground it constituted prayer." *Id.* at 1567. A high school student in Hillsborough testified that the moment of silence violated his beliefs. *Ibid.* The superintendent of Paramus schools testified that "students and teachers generally perceived the minute of silence Bill as an effort to circumvent the Supreme Court decisions and to reintroduce prayer into the schools." *Ibid.*

Parents also saw a religious purpose behind the law. Parents in Old Bridge Township testified that they viewed

the moment of silence as "an essentially religious observance." *Ibid.* The superintendent of Princeton schools testified that parents had called him to complain that the exercise was "a form of enforced prayer." *Ibid.* The district court opinion recited instances of other similar reactions.

Standing alone, such evidence of public perception may not be enough to invalidate a law. But where the law in question has no discernible purpose other than the "accommodation" of religion and the religious exercise accommodated needs no such accommodation for its free practice, the law gives a message of endorsement of prayer. The identification of government with a message of endorsement of religion violates a core purpose of the Establishment Clause. *Grand Rapids School District* v. *Ball*, ___ U.S. ___, 105 S.Ct. 3216, 3226 (1985). Practices having such an effect, "whether intentionally or unintentionally, . . . in reality or public perception," are unconstitutional. *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

CONCLUSION

For the reasons above, amici curiae believe that the Court does not have jurisdiction to hear this appeal. In the alternative, amici urge this Court to affirm the decision of the Third Circuit Court of Appeals.

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IN THE

Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals For the Third Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE AMERICAN JEWISH COMMITTEE, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, AND PEOPLE FOR THE AMERICAN WAY IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Interest of the Amici	1
Statement of the Case	11
Summary of the Argument	15
Argument	19
I. THE STATUTE VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT	19
A. The Statute is Unconstitutional Because it Lacks a Secular Legislative Purpose	23
B. The Primary Effect of the Statute is to Advance Religion	39
II. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW	46

PAGE

A. The Court of Appeals Properly Affirmed the District Court's Findings Under the "Clearly Erroneous" Standard of Rule 52(a)..... 48

1. The "Clearly Erroneous" Standard is the Correct Standard..... 48

2. Under the "Clearly Erroneous" Standard, the District Court's Judgment was Properly Affirmed..... 52

B. The District Court's Findings of Fact Must be Affirmed Under Any Standard of Review..... 54

Conclusion..... 60

Appendix A..... 1a

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. City of Bessemer City, North Carolina, ____ U.S. ____, 105 S.Ct. 1504 (1985)	53
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).....	18, 49-50
Engel v. Vitale, 370 U.S. 421 (1962).....	12, 20, 37-38,
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).....	37
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640(1981).....	41-42
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).....	9
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd., 455 U.S. 913 (1982)..	36-37
Lemon v. Kurtzman, 403 U.S. 602 (1971).....	15-17, 21-22, 34, 39

PAGE

Miller v. Fenton,
_____ U.S. _____,
106 S.Ct. 445 (1985).....49-50

Norris v. Alabama,
294 U.S. 587 (1935)..... 50

Perry Education Association v.
Perry Local Educators'
Association,
460 U.S. 37 (1983)..... 42

Planned Parenthood Association
v. Chicago Transit Authority,
767 F.2d 1225 (7th Cir.
1985) 51-52

School District of Abington
Township v. Schempp,
374 U.S. 203 (1963).....12, 37

Stone v. Graham,
449 U.S. 39 (1981)..... 32

United States v. O'Brien,
391 U.S. 367 (1968)..... 30

United States v. United States
Gypsum Co.,
333 U.S. 364 (1948)..... 52

United States Postal Service v.
Council of Greenburgh Civil
Associations,
453 U.S. 114 (1981)..... 42

PAGE

Wallace v. Jaffree,
U.S.
105 S.Ct. 2479 (1985)..... 16, 23
31-32
35, 38
47

Statutes

N.J.S.A. 18A: 36-4.....12-13

Rules

Fed. R. Civ. Pro. 52(a).....46, 48
Fed. R. Evid. 803(24)..... 24

Miscellaneous

Levy, The Establishment Clause:
Religion And the First
Amendment (1986).....20-21

Monaghan, Constitutional Fact Review
85 Colum. L. Rev. 229 (1985)..49-50

INTEREST OF THE AMICI

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political, and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the freedoms secured by the First Amendment and especially the freedoms secured by its Establishment and Free Exercise Clauses, particularly as these principles apply to the nation's public schools.

The American Jewish Committee ("AJC") is an organization of some 50,000 American Jews which was founded in 1906 to protect the civil and religious rights of Jews. It has always been the conviction of AJC that the civil and religious rights of Jews can only be secure if the civil and

religious rights of Americans of all faiths are equally secure. It has also been our belief that religious rights are most secure when the constitutional principle of separation of religion and government is fully observed. AJC believes, therefore, that it is not a proper role of government to promote prayer in tax-supported public schools. Yet that was the manifest purpose of the New Jersey statute under review by this Court. Quite apart from the serious jurisdictional question in the case at bar, no special statute is needed for the secular purpose of allowing students to observe one minute of silence daily in order to make an orderly transition from the outside world to the classroom.

The Union of American Hebrew Congregations ("UAHC") is the nationwide, congregational arm of the Reform Jewish movement and consists of over 800 member Congregations in North America. Through its Religious Action Center and its National Social Action Commission, UAHC has worked consistently to protect the religious, civil, political and economic rights of Jews and all individuals. It has authorized various leaders to testify before the United States Congress and other administrative bodies on matters of concern to the organization and its membership, including issues pertaining to church/state relations and the maintenance of a strong wall of separation between church and state.

People for the American Way is a

member based, non-partisan, education oriented citizens' organization established to promote and protect civil and constitutional rights. People for the American Way was founded in 1980 by a distinguished bipartisan group of religious, civic and education leaders devoted to our heritage of tolerance and pluralism; it now has 250,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of our democratic tradition and defend against attacks from those who would impose their own narrow sectarian views on our free society.

The members of People for the American Way are strongly committed to preserving religious liberty and its constitutional corollary, the separation

of church and state. Religious instruction is the responsibility of parents, churches and synagogues. Our organization opposes state-imposed religion in the public schools, which squarely violates the First Amendment.

People for the American Way works to achieve these goals in a variety of ways, including the national distribution of publications and a speakers bureau of experts on education and church-state issues. People for the American Way also recently initiated a legal defense fund which has provided invaluable assistance to parents and school officials in opposing the establishment of legal precedents that would undermine basic First Amendment guarantees.

This brief was prepared by the

American Jewish Congress on behalf of the National Jewish Community Relations Advisory Council, the national planning and coordinating body for the field of Jewish community relations, and its following national member agencies: American Jewish Committee, American Jewish Congress, B'nai B'rith International, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America--National Women's League for Conservative Judaism, Women's American ORT, and the 113 community member agencies representing all major Jewish communities throughout the United States. These communities are listed in Appendix A.

The Jewish community, through the actions of its representative agencies, has long sought to insure that church and state are kept separate. As a small religious minority in an overwhelmingly Christian country, commitment to the separation principle serves to help maintain the Jewish community's status as political and civic equals in a religiously alien society.

The amici believe that, rather than serving to derogate from the individual and collective exercise of religious liberty, the separation of church and state is an integral and indispensable guardian of that liberty.

At bottom, this case is not about whether one or the other branches of the tripartite test has been violated, or the

proper scope of the accommodation doctrine. This case presents, in stark relief, the question of whether it is the business of government to encourage or promote religious observance; or whether, as the amici believe, it is no business of government to serve as an advocate of religion.

The moment-of-silence itself appears to be relatively innocuous. But the role of the State of New Jersey as an active advocate and promoter of religion is, in the view of the amici, a serious threat to religion, as well as to religious liberty.

Nor do the amici, who include almost all representatives of American Judaism, believe that the separation of church and state, particularly in the public schools, constitutes hostility toward religion.

Rather, they agree with Justice Frankfurter, that:

> the secular public school did not imply indifference to the basic role of religion in the life of the people nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered.

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 216 (1948) (concurring opinion).

Finally, the *amici* believe, based on many years of experience, that a judgment upholding the statute would be widely seen as a green light from the Court for further, more intrusive, governmental measures to encourage religion in the public schools. Moreover, this and other similar statutes will not be enforced by lawyers and judges sensitive to constitutional values, or in a forum where overreactions can be easily corrected, and where the victims of the violation are willing and able to complain. It will be applied by school officials, like those of the State of Alabama, who until enjoined by the Court of Appeals in a similar case, asserted a right to pray together with their students, notwithstanding this Court's clear pronouncement to the

contrary. It will be applied behind the closed doors of classrooms where impressionable children prefer conformity to standing out. For these reasons, as well as the more legalistic ones suggested below, the amici urge an affirmance.

The brief is filed with the consent of all the parties. The consents have been filed with the Clerk.

STATEMENT OF THE CASE

This case involves the constitutionality of a New Jersey statute that requires public school teachers and principals to permit students to engage in a moment of silence at the beginning of each school day. The eighteenth in a series of school prayer bills introduced

in the New Jersey Legislature (J.S.A. 6a),[1] N.J.S.A. 18A:36-4 ("the statute") is that body's most recent attempt to reintroduce prayer into the public schools following this Court's opinions holding school prayer unconstitutional. School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

The statute provides:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student,

[1] We follow the appellants' convention of referring to the appendix to appellants' jurisdictional statement as (J.S.A.) and to the Joint Appendix of the parties as (J.A.)

> before the opening exercises of each school day for quiet and private contemplation or introspection.

This action was commenced by Jeffrey May, a public school teacher threatened with disciplinary action for his refusal to enforce the statute in his classroom (J.A. 17-18), and by several New Jersey parents, both individually and on behalf of their children, who are public school students (J.A. 14-17). Named as defendants were Saul Cooperman, Commissioner of the New Jersey Department of Education, the Department of Education, and the boards of education of two municipalities. None of the named defendants saw fit to defend the statute's constitutionality, enacted in December 1982 over the veto of Governor Kean, who determined it to be constitutionally

infirm. (J.A. 381-83). Both houses of the New Jersey Legislature, along with the Speaker of the General Assembly and the President of the Senate intervened, although the Legislature itself has since dropped out of the litigation. The two individual legislators, as intervenors, are the only litigants defending the statute's constitutionality.

Based on an extensive record that included evidence concerning the legislative history of the statute and testimonial evidence from many witnesses about the actual and possible effects of the statute, the District Court found that the statute violated the Establishment Clause of the First Amendment in that it was enacted solely for religious purposes, its primary effects both advance and

inhibit religion, and it fosters excessive government entanglement with religion. (J.S.A. 63a-100a). See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

The Court of Appeals for the Third Circuit affirmed (J.S.A. 1a-61a), agreeing with the District Court that the statute has no secular purpose, but disagreeing on the remaining issues. In affirming, the appellate court accepted the District Court's finding of facts under a "clearly erroneous" standard.

SUMMARY OF THE ARGUMENT

The New Jersey statute violates the Establishment Clause of the First Amendment and should be ruled unconstitutional. As the District Court found, the history of the statute's

enactment can lead only to the conclusion that the sole purpose for the statute is the reintroduction of prayer into New Jersey's schools. Under Lemon v. Kurtzman, supra, the statute is therefore unconstitutional. Appellants' argument of the impropriety of testimonial evidence offered to prove the intent of the Legislature should be rejected. This Court's recent decision in Wallace v. Jaffree, _____ U.S. _____, 105 S.Ct. 2479 (1985), considered similar evidence in striking down an Alabama statute. Moreover, the record is clear that the purpose of the statute is to send a message that religious observance has returned to New Jersey's schools.

Second, the District Court properly found that the statute's primary effect is

both to advance and to inhibit religion. In so finding, the Court properly considered evidence of the actual and projected consequences of the statute's implementation. Of particular import is the effect that the statute has on religious minorities, faced with the choice of absenting themselves from the classroom or of bowing to the pressure of conforming to the majority's activity. Such a choice is precisely what the Establishment Clause was intended to avoid. Therefore, the District Court properly held the statute unconstitutional under Lemon's effects test. The Court of Appeals, while correct in affirming the judgment, improperly analyzed the effect of the statute under a doctrine not applicable to this Establishment Clause

case. Thus, the statute should be held unconstitutional on at least two grounds.

The "clearly erroneous" standard, which was used in reviewing the District Court's decision, was the proper one. The limited exceptions to the "clearly erroneous" standard articulated in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), do not apply here. Neither the relative firmness of the governing legal principles nor the potential for bias require the application of a more exacting standard of review than called for in the Federal Rules of Civil Procedure.

What is more, the decision below should be affirmed under any standard of review.

As the District Court found, there was essentially no evidence of a secular purpose for the statute. The secular purpose espoused by appellants at trial was not even conceived until after commencement of this litigation.

Amici, finally, agree with the position of the Solicitor General that the appellants lack standing to maintain this appeal (U.S. Br. at 8-13). In order to avoid repetition amici will rely on this portion of the Government's brief.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

POINT I

THE STATUTE VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

As this Court pointed out some twenty-five years ago, the considerations

that led the Founders to adopt the Establishment Clause were many. "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." Engel v. Vitale, supra, 370 U.S. at 431. The "coercive pressure upon religious minorities to conform" to state-approved and state-funded religions, fear of religious persecution in the context of state-sanctioned religious beliefs and the perversion of religion through enforcement by the state's police power were also factors leading to the inclusion of the Establishment Clause in the Constitution. Id. at 431-32. See also, Levy, The Establishment Clause: Religion and the

First Amendment (MacMillan Publishing Co. 1986).

This Court's Establishment Clause jurisprudence has developed to further these important goals. Since the Court's 1971 decision in Lemon v. Kurtzman, supra, virtually every case in which this Court has interpreted the Establishment Clause has proceeded under the three-part test established in that case:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-13. By requiring that a statute pass muster under all three criteria -- purpose, effect and entanglement -- the Lemon test protects

the people from both intentional and inadvertent legislative attempts to place government in the business of religion. Thus, the Lemon test serves to support the foundations of the Establishment Clause.

Both the District Court and the Court of Appeals analyzed this case under Lemon's three-pronged test and held the New Jersey statute unconstitutional under that test. Because the purpose of the statute was the reintroduction of prayer into New Jersey's public schools, and because the primary effect of the statute is the encouragement of prayer with an accompanying "coercive" effect upon religious minorities, the statute is constitutionally infirm under at least two prongs of the test.

A. The Statute is Unconstitutional Because it Lacks a Secular Legislative Purpose.

Both of the lower courts found that the statute lacks any secular purpose, which rendered it unconstitutional without further analysis. This Court, it is respectfully submitted, should do the same. "When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one." Wallace v. Jaffree, supra, 105 S.Ct. at 2495 (1985) (Powell, J., concurring).

The District Court's ruling was based on a series of factual findings set forth in the opinion. Included among them was the following:

> 5. The purpose of Bill 1064 [the statute] was to mandate a period at the start of each school day when all students

> would have an opportunity to engage in prayer. . .

(J.S.A. 86a). The Court reached this conclusion after considering extensive testimonial and documentary evidence on the issue of legislative intent.

In the absence of any official record of legislative proceedings, the court permitted the testimony of several individuals who had witnessed portions of the legislative process.[2] The issue of religion had dominated the legislative debates. For example, Reverend Dudley E. Sarfaty, who attended some of the

[2]The Court also permitted the introduction into evidence of newspaper articles under Rule 803(24) of the Federal Rules of Evidence. Given the absence of a legislative record, the District Court acted properly in admitting the articles into evidence under that rule. In any event, these played no role in the findings concerning the purpose of the statute (J.S.A. 85a), and therefore should play no role in this appeal.

legislative debate, testified that Senator Addabbo had stated that "it would be a good thing if the state would subsidize parochial education, and that this Bill was a good step in that direction." (J.A. 368). Backers of the bill, A-1064, issued pro forma denials of religious purpose, but aside from conclusory, self-serving declarations that the bill had some unarticulated secular function, the record is bare of any evidence that the Legislature had given serious consideration to any plausible or even understandable secular purpose.

The Court further took into account the history of the introduction of related bills by members of the New Jersey Legislature, including those introduced by a sponsor of the statute. That sponsor,

Assemblyman Zangari, had been quoted in the testimony of witnesses who attended the legislative debate and hearings as having said that he introduced the bill for religious purposes. For example, one witness testified:

> Yes. I recall very vividly that he talked in his testimony about his own background. He said that although he was a Catholic by conviction, as a child he had gone to Protestant schools. He had been encouraged to participate in Protestant oriented prayer, and he said prayer had never done him any harm.

(J.A. 270)(testimony of Joseph Nathan Chuman, Ethical Culture Society of Bergen County).

In fact, the entire history of the bill's passage contains no evidence of secular purpose that its defenders could later use. Marianne Rhodes, who

attended Senate and Assembly committee hearings, testified that there was no discussion of any educational uses for a moment of silence. She further testified that Assemblyman Zangari had argued that the bill could help "our society get back to the religious values which are deeply imbedded in our ideals." (J.A. 275). The record shows that no educational professional or other expert testified before a legislative committee to show any allegedly secular educational benefits of a moment of silence. Indeed, such education professionals as did testify opposed the bill.

The District Court rejected as "an after-the-fact rationalization" the appellants' position that the statute serves the educational purpose of creating

a transition from home life to school work. (J.S.A. 87a). In fact, on cross examination, appellants' expert witness admitted that he was not asked to look into the purpose of the statute until after its enforcement had been enjoined by the District Court in this case, even though a legislative aide with responsibility for the bill was his neighbor and frequent driving companion. (J.A. 357-58).

The evidence virtually forces any reasonable trier of fact to conclude that educational purposes had nothing whatsoever to do with the enactment of the statute. Not only does it appear that none of New Jersey's educational organizations supported enactment, but none of the original defendants, all involved in the education of New Jersey's children, was

even willing to defend this lawsuit. No evidence was offered showing any debate on the issue of whether the moment of silence law would provide a transition from home to school. It is inconceivable that the statute was enacted for purposes that no one ever mentioned until after the commencement of this constitutional challenge.

Furthermore, it is implausible to suppose that the Legislature would enact a statute requiring teachers to exercise for pedagogical purposes a power that they had without any additional legislation -- the power to insist that students be quiet. Without any evidence, appellants invite this Court to assume that the Legislature, never mentioning it in debate or hearings, made a universal pedagogical decision

concerning student alertness in the morning. The Court should decline this invitation. Under any standard of review, the District Court's findings that the statute was enacted for religious, and not educational purposes, should be affirmed.

Appellants' argument that the District Court erred in its conclusion that the statute lacks a legitimate secular purpose is entirely evidentiary. Appellants severely criticize that Court, as well as the Court of Appeals, for what they term "a wholly unprecedented judicial search for legislative purpose." (App. Br. 29). Relying heavily on United States v. O'Brien, 391 U.S. 367 (1968), appellants argue that the courts are constrained to consider only the language of the statute as evidence of the legislative intent.

Appellants have misconstrued the law. This Court has consistently relied on precisely the types of evidence that form the basis of the opinions below. This is not surprising since in most instances, including that of the New Jersey statute before the Court, the only evidence of the statute's purpose will be evidence related to the legislative history. Couched in evidentiary terms, appellants' position actually asks the Court to abandon the substance of the purpose test.

Most recently, in Wallace v. Jaffree, supra, this Court relied heavily both on statements of individual legislators, 105 S.Ct. at 2483, 2490, and on the prior acts of the Legislature, 105 S.Ct. at 2491-92, in striking down an Alabama moment of silence law. In fact, Justice Stevens'

majority opinion in Jaffree refrained from a detailed analysis of statutory language, in the light of such strong evidence of the religious purpose of the legislation. 105 S.Ct. at 2493. While Justice O'Connor would give more weight to evidence of legislative history and less to the motives of individual legislators, her concurrence concluded that the "Alabama statute was intended to convey a message of state encouragement and endorsement of religion." 105 S.Ct. at 2502 (O'Connor, J. conncurring). Justice O'Connor further warned against the formulation of a "sham secular purpose," in order to fabricate a record for judicial review. Id. at 2500. See Stone v. Graham, 449 U.S. 39 (1981)(rejecting "avowed" secular purpose of requirement that Ten Commandments be posted).

The so-called secular purpose espoused by the appellants is a sham. To the extent that the record contains any support for the notion of a beneficial transition period, that evidence goes to the effect of the statute -- not to its purpose. It is conceivable that a statute enacted entirely for religious purposes will have a number of ramifications, some of them secular. But this does not render such a statute constitutional. Government must not be permitted to legislate religious exercises into the public schools and to defend its doing so on the ground that some of the consequences are positive from a secular point of view. Amici are committed to the perspective that religious observance forms the foundation of many values important to human interaction in today's world.

However, this does not mean that our public schools are the place in which religious activity should occur.

In his amicus brief, the Solicitor General argues for a substantial departure from the analysis of the Establishment Clause set forth in Lemon v. Kurtzman and its progeny. Likening the statute to other governmental activities that accommodate religion without taking a stand on its virtues, the Solicitor General takes the position that governmental creation of an opportunity for prayer in the schools is permissible, while governmental promotion of religion is not. (U.S. Br. 24).

The distinction drawn by the Solicitor General will not always be a real one, and cannot be maintained in this case. Where, as here, the evidence clearly shows that by

enacting the statute government is "conveying or attempting to convey a message that religion...is favored or preferred," Wallace v. Jaffree, supra, 105 S.Ct. at 2497 (O'Connor, J., concurring), the statute fails to meet the standards of the Constitution. While the Establishment Clause permits the government to create an opportunity for prayer (children are not prohibited from praying privately during the free time in the public schools), the government may not create such an opportunity for the purpose of endorsing religion or a particular set of religious beliefs.

Moreover, as Justice Stevens points out in Wallace v. Jaffree, supra, the entire issue of accommodation does not even arise absent a showing that governmental

practice had been impeding children from praying each morning. 105 S.Ct. at 2491, n. 45. No such impediment has been alleged in this case.

Virtually all of the school prayer statutes held to be unconstitutional can be seen as mere accommodations to religion under the Solicitor General's analysis. For example, in Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd., 455 U.S. 913 (1982), the Fifth Circuit, in a decision affirmed by this Court, struck down a Louisiana statute that permitted, but did not require, public school students to pray. Holding that the voluntary nature of the prayer exercise was "not relevant to the Establishment Clause inquiry", 653 F.2d at 902, the Court pointed out that "an Establishment Clause violation does not

depend upon the presence of actual government coercion." Id. See School District of Abington Township v. Schempp, supra, 374 U.S. at 211-13; Engel v. Vitale, supra, 370 U.S. at 430. In Schempp, the Court specifically held that the voluntary nature of the required exercises was not sufficient to remove the statutes from the reach of the Establishment Clause. 374 U.S. at 224-25. See also Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

Similarly, the ability of students to excuse themselves from the classroom does not render New Jersey's moment of silence statute constitutional. Young children should not be faced with the unhappy choice between participating in a ritual that offends their religious beliefs or sending themselves out of the room as members of a

religious minority. Children frequently enough find themselves under pressure to conform to the views of their peers. For government to put children in this unenviable position would be an act inconsistent with the purposes of the Establishment Clause. Most affected by such governmental involvement in religion are religious minorities, especially those who do not adhere to any religion at all. Wallace v. Jaffree, supra, 105 S.Ct. at 2497 (O'Connor, J., concurring); Engel v. Vitale, supra, 370 U.S. at 431-32. Asked about the effect that the statute would have on atheists, Assemblyman Zangari was quoted as saying, "those people are so few in number, that those interests, we can basically afford to discount [them]." (J.A. 271). That, however, is what the

Constitution forbids. For these reasons, it is respectfully submitted that the Solicitor General's position should be rejected.

B. The Primary Effect of the Statute is to Advance Religion

The statute's lack of a legitimate secular purpose is sufficient to render it unconstitutional under Lemon v. Kurtzman, supra. The statute, however, violates the Establishment Clause for the additional reason that its primary effect is to advance religion. The District Court so held on the basis of a careful and thorough evaluation of the evidence. Because this finding was not clearly erroneous (see Point IIA, infra), the Court of Appeals itself erred in reversing this finding, although the error did not

affect that Court's correct holding that the statute was unconstitutional.

The District Court found that the effects of the statute will vary from community to community. The Court of Appeals disagreed, holding that the statute's principal effect is an accommodation to those who wish to pray, and not the advancement of religion, despite the religious purpose of the statute. With respect to those students who do not wish to participate, the Court of Appeals held that requiring them to sit quietly through the exercise, as occurred in at least one school district, was an acceptable time, place and manner regulation for the protection of the rights of those who wish to observe the exercise.

We respectfully submit that the Court of Appeals incorrectly introduced the doctrine of time, place and manner regulation into this Establishment Clause case. The cases relied upon by the Court concern regulation of expression protected by the Free Exercise Clause. For example, in Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), the Court upheld a Minnesota regulation requiring that the distribution of written materials at a state fair be confined to a particular area of the fairgrounds. The Establishment Clause was not implicated in that case. Had the regulation in question required that the distribution occur at a time or in a manner offensive to the religious views of the Krishna Society, the case would be of

greater relevance. Never did the Court in Heffron conclude that time, place and manner regulations can be used to require individuals to remain silent in a particular locale while others pray. For similar reasons, the other Free Exercise Clause cases cited by the Court of Appeals are irrelevant. See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)(regulation of access to teachers' mailboxes by unions upheld); United States Postal Service v. Council of Greenburgh Civil Associations, 453 U.S. 114 (1981) (statute upheld prohibiting placement of unstamped material into letterboxes).

In the case before the Court, free exercise is not an issue. No one who wishes to pray at New Jersey's public

schools has argued that the absence of a daily moment of silence prohibits him or her from doing so. On the other hand, considerable evidence was presented as proof that the statute would have, and was already having, a substantial effect on those who, for religious reasons, wished to refrain from observing the moment of silence. Plaintiff May, a teacher, had already been threatened with disciplinary action. In at least one school system, the objections of many parents, teachers and students made implementation difficult. In others, the statute seemed to have no effect, religious or otherwise. Experts testified as to the likely psychological and educational effects of the statute.

The District Court held that "[w]hile

this form of legislation advances the religion of some, it inhibits the religion of others..." (J.S.A. 95a). Based on the extensive record, the Court determined that the religious ramifications of the statute were extensive. Among them:

> Finally there are those who profess no religion and to whom any form of prayer is offensive. Bill 1064 requires these persons to assume a posture suggestive of particular forms of prayer which are responsive to particular beliefs about ultimate reality. Understandably those who do not share those beliefs do not wish to be required to maintain a pose which suggests that they do. Children holding these views, as illustrated in the present case, are forced either to endure an exercise which runs counter to their beliefs or to face public opprobrium or ridicule by asking to be excused each day.

(J.S.A. 97a).

The finding that, among the various potential effects of the statute, the primary effect was both to advance and inhibit religion cannot be held to be clearly erroneous. At a minimum, it is an entirely reasonable interpretation of the record. The effect on those children and teachers whose religious views are offended by the exercise is especially profound. For these reasons, and because the Court of Appeals misapplied the law regarding regulation of free speech to this case, the statute should be struck down in that its primary effect, religious in nature, runs afoul of the Establishment Clause.

POINT II

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW

In reviewing the District Court's factual findings, the Court of Appeals applied the proper standard, the "clearly erroneous" test of Rule 52(a), Fed. R. Civ. Pro., and applied it in the proper fashion. Moreover, the District Court's findings would have to be affirmed even under the more searching standard of review championed by appellants and the dissenting judge below.

More fundamentally, however, the standard-of-review question, though of some theoretical interest, is of limited practical importance here. When the District Court found that the New Jersey legislature lacked an authentic secular purpose in enacting the statute, it relied

on essentially all the evidence any district judge is ever likely to have. If it is true "that our courts are capable of distinguishing a sham secular purpose from a real one," Wallace v. Jaffree, supra, 105 S.Ct. at 2500 (O'Connor, J., concurring), they must be able to do so on substantially the same type and amount of evidence as the District Court had here.[3]

We submit that the argument for a searching standard of factual review is really the disguised assertion that a facially neutral moment of silence

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[3] In some states, unlike New Jersey, there may be an "official legislative history," Wallace v. Jaffree, 105 S.Ct. at 2500 (O'Connor, J. concurring) on which a court may rely. In other cases, unlike this one, legislators who cannot be compelled to testify may volunteer to do so. Where such better evidence is available, it may be appropriate to require resort to it, but that is not this case and will not be the usual case.

statute has a saving secular purpose as a matter of law. We submit, however, that the District Court's findings of fact must be sustained, on any standard of review, if the facts matter at all.

A. The Court of Appeals Properly Affirmed the District Court's Findings Under the "Clearly Erroneous" Standard of Rule 52(a)

1. The "Clearly Erroneous" Standard is the Correct Standard

Ordinarily, appellate review of factual findings is limited. When a District Court has found a fact, the finding "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. Pro. 52(a).

In rare circumstances, however, courts of appeals, and this Court, engage in something more exacting than this "clearly erroneous" review. It is admittedly difficult to articulate when such review is called for. See, e.g., Bose Corp. v. Consumers Union of United States, Inc., supra; Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985). It appears, however, that two situations tend to lead to independent appellate review of facts.

First, when the governing legal principle is insufficiently developed or so inherently indefinite that it "can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive

force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." Miller v. Fenton, ___ U.S.___, 106 S.Ct. 445, 452 (1985). See, e.g., Bose, supra; Monaghan, supra, 85 Colum. L.Rev. at 273-75. Second, the potential for systemic or other bias against federal rights elsewhere in the judicial system has justified independent appellate review of factual findings. Miller v. Fenton, supra, 106 S.Ct. at 452; Norris v. Alabama, 294 U.S. 587 (1935); Monaghan, supra, 85 Colum. L. Rev. at 272-73.

Neither situation exists here, and thus no independent review of the District Court's factual findings is warranted. The governing legal standard has meaning enough that it can be applied

straightforwardly to adequately established historical facts. A sham secular purpose is no secular purpose, and whether an asserted secular purpose is a sham is purely a matter of historical fact. Furthermore, whatever danger there may be of systemic or other bias in cases such as this is obviated where, as here, the only parties with a federal right at stake prevailed. Since schoolchildren who wish to pray silently in the public schools are always free to do so, their rights could not be affected by any decision in this case. The only parties whose rights could be endangered by biased, disingenuous, or merely incorrect fact-finding have prevailed and do not require the protection of further factual review. Cf. Planned Parenthood

Association v. Chicago Transit Authority, 767 F.2d 1225, 1228-29 (7th Cir. 1985).

Because this case presents none of the special circumstances calling for independent appellate review of the facts, therefore, the "clearly erroneous" standard applied by the Court of Appeals was the correct standard.

2. Under the "Clearly Erroneous" Standard, The District Court's Judgment Was Properly Affirmed

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The majority of the Court of

Appeals had no such "definite and firm conviction," and on the record before them they could not have.

The District Court's "account of the evidence is plausible in light of the record viewed in its entirety;" therefore, "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, North Carolina, __ U.S.___, ___, 105 S.Ct. 1504, 1512 (1985). Here, the District Court took one of "two permissible views of the evidence, [therefore] 'the fact-finder's choice between them cannot be clearly erroneous." Id.

In part B, infra, we demonstrate that the evidence in this case withstands even

plenary review. At the very least, it is impossible to deny that the District Court's findings reflect a permissible view of that evidence. Those findings, therefore, must be affirmed.

B. The District Court's Findings of Fact Must be Affirmed Under Any Standard of Review

The District Court found that the only secular purpose offered for the statute was a pretext. The District Court also found evidence of religious purpose. Under any standard of review, those findings must be affirmed. The historical facts on which they were based were largely undisputed, and the inferences of purpose were the only sensible ones.

The Reverend Dudley Sarfaty, who witnessed the veto override debate, said:

"It would be fair to say that almost the entire legislative debate on the bill focused on whether or not A-1064 was 'a prayer bill'." (J.A. 37). Various legislators, of course, denied that it was a "prayer bill" and said it had a secular purpose, but none defended that position by reference to any secular facts developed in committee hearings or previous studies, or even by reasoned argument.

The Reverend Sarfaty, asked directly "whether or not there were any discussions of any substantial nature concerning the pedagogical objectives or purposes of Assembly Bill 1064," responded:

> No, there weren't. There were no discussions that I recognize as related to pedagogy. The only one was a kind of social control

> argument that Senator Dumont used.

(J.A. 371).

Senator Dumont's "social control argument" was that "he thought this kind of ceremony in school would cut down crime and disruption," (J.A. 369. See also J.A. 68), an argument often put forward in support of school prayer, but never seriously asserted, not even by appellants' witnesses, as a possible benefit of mere secular silence.

At a time, then, when demonstrating --or even articulating--a plausible secular purpose was of vital importance, the proponents of the bill were silent.

All of this evidence is undisputed and more than sufficient to support the District Court's finding that:

> The attempt to develop rational support for the thesis that a minute of silence served a transitional purpose commenced after this law suit was underway rather than before the Bill was adopted.

(J.S.A. 88a).

Even the controverted evidence adds support to the District Court's findings that the only purported secular purpose of the statute was a sham.

Experts testified on the pedagogical merit of a moment of silence. Dr. Scrupski for appellants and Drs. Kuriloff and Rosner for appellees disagreed on whether the moment of silence would perform any legitimate secular function at all. Even if only Dr. Scrupski's testimony were credited, however, the most that could be said is that a moment of silence forms a "boundary between the

world of not-school and that of school." (J.A. 353).

But the District Court was entitled to recognize that such a secular purpose, even if real, is not the stuff of public controversy. The District Court was entitled to take judicial notice that while the question whether there ought to be prayer in school arouses deep emotion, the question whether there ought to be a 60-second boundary between school and not-school does not. The record of vehement public debate over the statute amply justified the District Court's conclusion that "only the utterly naive would conclude that the Bill's advocates were fighting passionately for establishment of such a boundary." (J.S.A.

90a).[4]

On any standard of review, then, the evidence establishes that the legislature had no bona fide secular purpose. If this evidence does not support the District Court's findings, no evidence likely to be available in the real world ever will. If shams are to be detected at all, they must be detected on evidence like that before the District Court in this case.

The consequence of reversing the District Court's findings would be to insulate from review any facially neutral moment of silence statute so long as legislators put into the record

[4] This record of vehement public debate is further supported by a history of attempts by the New Jersey legislature either to reintroduce prayer in the public schools or to enact moment of silence laws.

conclusory invocations of secular purpose. But if evidence matters at all, we submit that the evidence here is more than sufficient to require affirmance, however closely examined.

CONCLUSION

For the reasons set forth above, this appeal should be dismissed. Should the Court reach the merits, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

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Appendix A

Birmingham Jewish Community Council

Greater Phoenix Jewish Federation

Tucson Anti-Defamation--Community Relations Committee of the Jewish Community Council

Greater Long Beach and West Orange County Jewish Community Federation

Los Angeles Community Relations Committee of Jewish Federation-Council

Oakland Greater East Bay Jewish Community Relations Council

Orange County Jewish Federation

Sacramento Jewish Community Relations Council

San Diego Community Relations Committee of United Jewish Federation

San Francisco Jewish Community Relations Council

Greater San Jose Jewish Community Relations Council

Greater Bridgeport Jewish Federation

Greater Danbury Community Relations Committee of Jewish Federation

Greater Hartford Community Relations Committee of Jewish Federation

New Haven Jewish Federation

Eastern Connecticut Jewish Federation

Greater Norwalk Jewish Federation

Stamford United Jewish Federation

Waterbury Jewish Federation

Jewish Community Relations Council of Connecticut

Wilmington Jewish Federation of Delaware

Greater Washington Jewish Community Council

South Broward Jewish Federation

Greater Fort Lauderdale Jewish Federation

Jacksonville Jewish Community Council

Greater Miami Jewish Federation

Greater Orlando Jewish Federation

Palm Beach County Jewish Federation

Pinellas County Jewish Federation

Sarasota Jewish Federation

Atlanta Jewish Federation

Savannah Jewish Council

Metropolitan Chicago Public Affairs Committee of Jewish United Fund

Peoria Jewish Federation

Springfield Jewish Federation

Indianapolis Jewish Community Relations Council

South Bend Jewish Federation of St. Joseph Valley

Jewish Community Relations Council of Indiana

Greater Des Moines Jewish Federation

Louisville Jewish Community Federation

Greater New Orleans Jewish Federation

Shreveport Jewish Federation

Portland Southern Maine Jewish Federation--Community Council

Baltimore Jewish Community Relations Council

Metropolitan Boston Jewish Community Council

Marblehead North Shore Jewish Federation

Greater New Bedford Jewish Federation

Springfield Jewish Federation

Worcester Jewish Federation

Metropolitan Detroit Jewish Community Council

Flint Jewish Federation

Minneapolis Minnesota and Dakotas Jewish Community Relations Council--Anti-Defamation League

Greater Kansas City Jewish Community Relations Bureau

St. Louis Jewish Community Relations Council

Omaha Jewish Community Relations Committee of Jewish Federation

Atlantic County Federation of Jewish Agencies

Bergen County Jewish Community Relations Council of United Jewish Community

Cherry Hill Jewish Community Relations Council of Southern New Jersey Jewish Federation

Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish Community Federation

Northern Middlesex County Jewish Federation

Raritan Valley Jewish Federation

Union Central New Jersey Jewish Federation

Wayne North Jersey Jewish Federation

Albuquerque Jewish Community Council

Greater Albany Jewish Federation

Binghamton Jewish Federation of Broome County

Brooklyn Jewish Community Council

Greater Buffalo Jewish Federation

Elmira Community Relations Committee of Jewish Welfare Fund

Greater Kingston Jewish Federation

New York Jewish Community Relations Council

Rochester Jewish Community Federation

Greater Schenectady Jewish Federation

Syracuse Jewish Federation

Utica Jewish Community Council

Akron Jewish Community Federation

Canton Jewish Community Federation

Cincinnati Jewish Community Relations Council

Cleveland Jewish Community Federation

Columbus Community Relations Committee of Jewish Federation

Greater Dayton Community Relations Committee of Jewish Federation

Toledo Community Relations Committee of Jewish Welfare Federation

Youngstown Jewish Community Relations Council of Jewish Federation

Oklahoma City Jewish Community Council

Tulsa Jewish Community Council

Portland Jewish Federation

Allentown Community Relations Committee of Jewish Federation

Erie Jewish Community Council

Greater Philadelphia Jewish Community Relations Council

Pittsburgh Community Relations Committee of United Jewish Federation

Scranton-Lackawanna Jewish Council

Greater Wilkes-Barre Jewish Federation

Providence Community Relations Committee of Rhode Island Jewish Federation

Charleston Jewish Community Relations Committee

Columbia Community Relations Committee of Jewish Welfare Federation

Memphis Jewish Community Relations Council

Nashville and Middle Tennessee Jewish Federation

Austin Jewish Community Council

Greater Dallas Jewish Community Relations Council of Jewish Federation

El Paso Jewish Community Relations Committee

Greater Houston Jewish Federation

Fort Worth Jewish Federation

San Antonio Jewish Community Relations Council of Jewish Federation

Newport News-Hampton Jewish Federation

Richmond Jewish Community Federation

Tidewater United Jewish Federation

Greater Seattle Jewish Federation

Madison Jewish Community Council

Milwaukee Jewish Council

Supreme Court, U.S.
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(18)

No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,

Appellants,

v.

JEFFREY MAY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE,* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a state legislature's enactment of a statute requiring public school principals and teachers to direct group meditation at a prescribed time before each school day was intended to endorse and has the effect of endorsing prayer in violation of the establishment clause of the first amendment.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE NEW JERSEY MOMENT OF SILENCE STATUTE REQUIRING GROUP MEDITATION BE DIRECTED BY STATE EMPLOYEES WAS ENACTED FOR RELIGIOUS PURPOSES WITH THE EFFECT OF ADVANCING RELIGION, IN VIOLATION OF THE FIRST AMENDMENT ESTABLISHMENT CLAUSE	4
A. The New Jersey Moment of Silence Law Unconstitutionally Legislates Group Meditation for Religious Purposes; as Such it is Unconstitutional Under the First Amendment Establishment Clause	5
1. The New Jersey Moment of Silence law's preeminent purpose is religious	5
2. The New Jersey Moment of Silence law's religious purpose is reflected in its context and legislative history	6
B. Implementation of the New Jersey Moment of Silence Law Involves The New Jersey Public Schools in the Advancement of Religion in Violation of the First Amendment Establishment Clause	11
1. The highest establishment standard applies in this case because New Jersey has endorsed prayer for children in the public schools	11
2. The New Jersey Moment of Silence law endorses prayer by providing the aid of state employees and the public schools	12
3. The New Jersey Moment of Silence law also provides the symbolic message of state endorsement of prayer	14

TABLE OF CONTENTS

PAGE

4. The New Jersey Moment of Silence law prefers certain prayer over others 15

C. Implementation of the New Jersey Moment of Silence Law Requires Excessive Administrative Entanglement of the State in Religious Matters . 16

II. THE NEW JERSEY MOMENT OF SILENCE LAW IS NOT AN ACCOMMODATION STATUTE NEEDED FOR FREE EXERCISE 17

CONCLUSION 20

TABLE OF AUTHORITIES

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PAGE

Abington v. Schempp, 374 U.S. 203 (1963) ..... *passim*
Aguilar v. Felton, 105 S.Ct. 3232 (1985) 12, 16, 17
Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982) 9, 12
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Duffy v. Las Cruces, 557 F. Supp. 1013 (D. N.M. 1983) ... 8, 9, 10, 11, 17
Engel v. Vitale, 370 U.S. 421 (1962) 3, 7, 12, 15, 18
Epperson v. Arkansas, 393 U.S. 97 (1968) 5, 6, 8, 9, 13, 18
Gaines v. Anderson, 421 F. Supp. 373 (D. Mass. 1976) 10, 14
Grand Rapids v. Ball, 105 S. Ct. 3216 (1985) 3, 4, 12, 14, 15
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) 17
Larson v. Valente, 456 U.S. 228 (1983) 6, 8, 9
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McCollum v. Board of Education, 333 U.S. 203 (1948) 13, 15, 16
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Mueller v. Allen, 463 U.S. 388 (1983) 14
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Ga. Code Ann. §20-2-1050 (1982) (enacted 1969) 7
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Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983) 16
Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364 (1983) 7

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF APPELLEES

Amici support the position of appellees and respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit in the above captioned case be affirmed.[1]

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief of Appellees.

[1] Appellants and Appellees have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court. This brief was prepared with the assistance of Steven Arenson, law clerk, Anti-Defamation League.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the League has previously filed as friend of the court in numerous cases dealing with prayer and other religious activities in the public schools, *see, e.g., Bender v. Williamsport*, 106 S. Ct. 1326 (1986); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Abington v. Schempp*, 374 U.S. 203 (1963). In the instant case, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty (ARL) is a nonprofit, nationwide educational organization whose members represent the entire religious spectrum. ARL is dedicated to defending religious liberty for all persons. It maintains the defense of religious liberty requires the strictest adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

SUMMARY OF ARGUMENT

This case presents the question of whether a state legislature may enact a statute requiring state school employees, principals and teachers, to direct group meditation in their public school classrooms.[2] The statute at issue today is only the most recent of New Jersey's series of proposed bills designed to permit organized prayer in the public schools and to avoid the decisions of this Court in

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[2] *Amici* do not here address the standing issue in this case but agree with the position of the Solicitor General on this question. *See* Brief for the United States as *Amicus Curiae* at 7-14.

Engel v. Vitale, 370 U.S. 421 (1962), and *Abington v. Schempp*, 374 U.S. 203 (1963). These legislative antecedents indicate New Jersey has "attempted to convey the message that children should use the moment of silence for prayer." *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause," *Stone v. Graham*, 449 U.S. 39, 42 (1980). The state may not do indirectly what it cannot do directly. It is not permitted to legislate a substitute for vocal prayer.

New Jersey's statute is designed to substitute a "moment of silence" for organized vocal prayer in our public schools. Its purpose is to have the children use the moment of silence for prayer and to encourage them to do so. If implemented it would have the effect of advancing religion, because it requires state employees to conduct student meditation in a group, at a specified time and place, at the start of each school day. Even the risk of such state endorsement of prayer is unconstitutional. *See Grand Rapids v. Ball*, 105 S. Ct. 3216, 3225 (1985). Moreover, this statute is not necessary to accommodate the free exercise of religion. *See Abington*, 374 U.S. at 225. Individual prayer, vocal or silent, at the option of the student, has long been available on or off New Jersey public school premises. *See Jaffree*, 105 S. Ct. at 2491 n.45. New Jersey's legislated group meditation statute is designed to introduce organized prayer in the guise of a moment of silence. It is not merely an accommodation of a student's right to pray, but an endorsement of a religious exercise in a school setting.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The New Jersey Moment of Silence law threatens these freedoms; it should therefore be held unconstitutional.

ARGUMENT

I. THE NEW JERSEY MOMENT OF SILENCE STATUTE REQUIRING GROUP MEDITATION BE DIRECTED BY STATE EMPLOYEES WAS ENACTED FOR RELIGIOUS PURPOSES WITH THE EFFECT OF ADVANCING RELIGION, IN VIOLATION OF THE FIRST AMENDMENT ESTABLISHMENT CLAUSE.

New Jersey's Moment of Silence law, N.J.S.A. § 18A:36-4 (West 1986) ("the statute" or "Bill 1064" or "the MOS") provides:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

Id. In reviewing a similar moment of silence statute out of Alabama, the Court asked "whether the state has conveyed or attempted to convey the message that children should use the moment of silence for prayer . . . whether the government intends to convey a message of endorsement or disapproval of religion." *Jaffree*, 105 S. Ct. at 2493. This question cannot be answered in the abstract, the Court held;[3] it "instead requires courts to examine the history, language and administration of a particular statute." *Id.* at 2499.

In determining whether the legislature intended to endorse prayer and religion, the *Jaffree* Court applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion." *Jaffree*, 105 S. Ct. at 2489-2490. The *Lemon* test has been applied by the Court "in every case involving the sensitive relationship between government and religion in the education of children." *Grand Rapids*, 105 S. Ct. at 3222.

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[3] A majority of the Court asserted the question is a factual one to be determined on a case by case basis; notwithstanding appellants' claims of a presumptive secular purpose, *see* Brief of Appellants at 36.

Under this test, the New Jersey Moment of Silence law is unconstitutional for its religious purpose of seeking to promote prayer in the schools, for its effect of advancing such religious practice, and because if implemented, it would entangle the public schools in administrating a potentially religious practice.

A. The New Jersey Moment of Silence Law Unconstitutionally Legislates Group Meditation for Religious Purposes; as Such it is Unconstitutional Under the First Amendment Establishment Clause.

1. The New Jersey Moment of Silence law's preeminent purpose is religious.

In determining whether a statute is consistent with the first amendment establishment clause, the Court has required there be a clear, preeminent or dominant secular purpose. *See Jaffree*, 105 S. Ct. at 2481; *Stone v. Graham*, 449 U.S. 39, 41 (1980); *McGowan v. Maryland*, 366 U.S. 420 (1961).[4] At issue is the legislation's primary purpose. *See Jaffree*, 105 S. Ct. at 2500 (O'Connor, J., concurring); *Stone*, 449 U.S. at 41-42.

The purpose of New Jersey's Moment of Silence law is clearly religious—it endorses prayer. So held the district court, J.S.A. 86a, and the Third Circuit. *Id.* at 26a. Appellants now claim such legislative purpose is irrelevant, suggesting distinctions be drawn between legislative "purpose" and "motive." *See* Brief of Appellants at 37. Yet the Court has drawn no such distinctions, but has used these terms interchangeably. *See Epperson v. Arkansas*, 393 U.S. 97, 108-109 (1968) *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *See also Washington v. Davis*, 426 U.S. 240, 244 (1976); Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 Yale L.J. 1205, 1217 (1970).

Pursuant to the first amendment establishment clause inquiry, the legislature may simply not act with a religious purpose. *Compare Jaffree*, 105 S. Ct. at 2495; *Stone*, 449 U.S. 39, and *Abington*, 374

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[4] Notwithstanding this standard, Judge Becker in his dissent sets out to prove a negative—requiring proof of absence of any secular purpose. *See* 780 F.2d at 254.

U.S. 203, *with Palmer v. Thompson*, 403 U.S. 217 (1971); *O'Brien*, 391 U.S. 367, and *United States v. Darby*, 312 U.S. 100 (1941). *See Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 685 (1980). The independent significance of purpose analysis in the first amendment religion clause area was affirmed by the Court in *Washington v. Davis*, 426 U.S. at 240 n.11, in distinguishing between *Palmer v. Thompson*, 403 U.S. 271 (1971) (eschewing consideration of illicit racial purpose) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (upholding close scrutiny of purpose of a challenged parochiaid statute). Notwithstanding limitations on purpose inquiry in other areas of constitutional adjudication, the Court has continued to examine legislative purpose in religion clause cases and invalidated government legislation or practices for religious intent. *See, e.g., Stone*, 449 U.S. 80; *Epperson*, 393 U.S. 97.[5]

In *Jaffree*, a moment of silence statute's purpose—to "return voluntary prayer to the public schools"—was declared an impermissible objective by a majority of justices. The Court found "no secular purpose." *Id.* at 2490. New Jersey's Moment of Silence law has a similar religious objective and no clear secular purpose. It is therefore unconstitutional.

2. The New Jersey Moment of Silence law's religious purpose is reflected in its context and legislative history.

In *Jaffree*, this Court relied upon four evidentiary factors in determining the purpose of the Alabama statute. These factors, *see infra*, also point to the New Jersey Act's unconstitutional religious purpose. They are statutory text, the legislation's antecedents, official legislative history and legislative sponsor statements. *See* 105 S. Ct. at 2479; *see also Larson v. Valente*, 456 U.S. 228, 254 (1983); *Widmar*, 454 U.S. at 211 n.10; *Stone*, 449 U.S. 39. In the instant case, the *Jaffree* factors—primarily the New Jersey Moment of

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[5] Accordingly, to the extent appellants rely on *Palmer* and *O'Brien*, *see* Brief of Appellants at 32-35, such reliance is misplaced.

Silence law's context and legislative history—together with the public perception of the law reflect its religious purpose. *See* Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364, 386, 388, 392 (1983).

The context of the New Jersey Moment of Silence Act shows it is merely a less blatant, but effective substitute for the vocal prayer statutes declared unconstitutional by this Court in the 1960's in *Abington* and *Engel*. *See* Note, *supra*, at 367. While none of the twenty-five current moment of silence statutes were enacted prior to the *Engel* and *Abington* school prayer decisions,[6] New Jersey had a preexisting vocal school prayer statute.[7] Following this Court's decisions barring school prayer and Bible reading, New Jersey began the legislative process leading to today's Moment of Silence Act.[8] This historical context, *amici* submit, shifts the burden of proving constitutionality to the New Jersey state legislature. In New Jersey prior to the Supreme Court's prayer decisions, the putative secular pedagogical purposes discussed *infra* never gave rise to the proposal of moment of silence legislation.

New Jersey's Moment of Silence Act has its origins in 17 prior bills, all of which followed this Court's decisions holding school prayer unconstitutional. This legislative context was key to the district court's determination of purpose, as affirmed by the court of appeals. *See* J.S.A. 27a; 90a. Numerous bills prior to the instant Act specifically referred to the purpose of putting vocal prayer back in the schools in New Jersey. J.A. 395.

The first such legislation, A.146, proposed in 1969, specifically mentioned prayer. Similar bills authorizing "a brief period of silent prayer or meditation" were proposed but not enacted in 1970, 1972, 1974, 1976, 1978, and 1980. In 1978, the legislature adopted A.646

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[6] *See Jaffree*, 105 S.Ct. at 2498 n.1 (O'Connor, J., concurring).

[7] *See also* Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Kansas, Massachusetts, Oklahoma, Tennessee. *See Amicus* Brief of State Attorneys General, *Murray* v. *Curlett*, 374 U.S. 203 (1963).

[8] *See also* Ga. Code Ann. § 20-2-1050 (1982) (enacted 1969); Ill. Rev. Stat. ch. 122, ¶ 771 (1981) (enacted 1969); Kan. Stat. Ann § 72-5308a (1980) (enacted 1969); Mass. Gen. Law Ann. ch. 71, § 1A (1982) (enacted 1966); Ohio Rev. Code Ann. § 313.60 (Baldwin 1982) (enacted 1969).

which mandated "a brief period of silent meditation" at the beginning of each day; it was not approved by the governor and thus failed to become law. J.A. 397. In 1980, Assemblyman James Zangari, the main sponsor of the New Jersey MOS, introduced its predecessor, A 2197, calling for a one minute period of silence. This bill was also left unsigned by Governor Brendan Byrne. On March 8, 1982, Bill 1064 calling for a period of silence "for quiet and private contemplation or introspection" was proposed. It passed over the governor's veto, and became the subject of the instant lawsuit.

As in *Jaffree*, where the Court held prior legislation reflected the purpose of the statute at issue, 105 S. Ct. at 2491 ("the unrebutted evidence of legislative intent . . . is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case"), here the district court found, and the circuit affirmed, the Act's seventeen prior drafts reflected the legislature's consistent religious purpose, and its attempts to mask that purpose. J.S.A. 27a; 87a, 90a. *See also Larson*, 456 U.S. at 254 (antecedent bill reflects consistent illicit legislative purpose).

The legislative context which prompted enactment of the instant New Jersey Moment of Silence statute as a substitute for vocal prayer casts doubt on the relevance of its text. *See Epperson*, 105 S. Ct. at 109 (reference to "divine creation" removed). *See also DeSpain v. DeKalb County Community School District 428*, 384 F.2d 836, 837 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968) (deleting "God" from daily recital did not prevent finding of unconstitutionality). As a substitute for vocal prayer, the MOS deletes explicit religious references, while continuing to convey the legislature's well known purpose of supporting prayer in the public schools. Thus, the New Jersey Moment of Silence law still embodies the hallmarks of prayer. The text requires the directed group silence to be at the same time, every school day, and it requires the congregating of the class as a group, under the aegis of a teacher presiding as the leader—elements symbolic of organized vocal prayer. *See, e.g., Duffy v. Las Cruces*, 557 F. Supp. 1013 (D.N.M. 1983).

Other evidence of Bill 1064's religious purpose lies in its legislative history. Legislative history, whether from official or unofficial

sources such as newspaper articles and letters from the public have long been considered by the Court to be helpful indicators of legislative purpose. *See, e.g., Larson*, 456 U.S. at 254 (relying on transcripts); *Epperson*, 393 U.S. at 272 n.16 (relying on newspaper ads); *see also Beck v. McElrath*, 548 F.Supp. 1161, 1163-64 (M.D. Tenn. 1982) (use of transcripts).

As in *Jaffree*, *see* 105 S. Ct. at 2490, the district court below found evidence of religious purpose in statements by sponsors of the bill. In the absence of official legislative history in New Jersey, these sponsor statements were recorded by witnesses at the hearings and newspaper articles. *See* J.A. 121. *See also Duffy*, 557 F. Supp. at 1015 (relying on "historical context, events leading up to passage of the Act, and the contemporaneous statements of the legislative sponsors" in the absence of legislative history in New Mexico). For example, the principal sponsor of Bill 1064, Assemblyman Zangari, called for the restoration of vocal prayer and Bible reading in the schools. *See* J.A. 275, 368. *See also* J.A. 35-37, 65-88. Assemblyman Zangari had also sponsored prior bills calling for various religious practices: one calling for an amendment to the United States Constitution to permit prayer in public places, including public schools, A.162 (1980), another providing for a period of prayer or scripture reading in each school before the beginning of the school day, A. 2196 (1980), and still another providing for a one minute period of silence after the beginning of each school day, A.2197 (1980). Further, as declared by Assemblyman Wolf, "whether we want to hide behind contemplation or reflection it's prayer." J.A. 65. Editorials noted "it is—as openly conceded by Senate President Carmen Orechio, D-Essex, a back-door school-prayer bill." J.A. 83.

Public perception, *see Epperson*, 393 U.S. at 108 n.16, of the MOS statute also showed widespread understanding of this religious purpose. *See generally* J.A. 74-87.[9]

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[9] This understanding was considered by the district court below to be material to the law's likely effect. J.A. 103. In ruling that newspaper articles and editorials were admissible as evidence of legislative intent and public perception, Judge Debevoise stated that "newspaper articles, magazine articles, editorials, these would bear on the public perception of the purpose and effect of the legislation." *Id.* at 121.

The context, legislative history, and public perception of the New Jersey statute reveal its preeminent religious purpose. As found by the district court below and affirmed by the circuit, the statute also lacks a secular purpose. J.S.A. 27a, 94a; J.A. 190-191, 293. Its putative pedagogical purpose, *see* Brief of Appellants at 42, is mere makeweight. Whether secular purposes could be imagined for state imposed silence, *see, e.g., Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976), is not the issue. Speculative legislative purpose has not sufficed for establishment clause scrutiny.[10] The question is whether the statute's actual purpose is secular. *See Jaffree*, 105 S. Ct. at 2490; *Stone*, 449 U.S. at 41.

That the secular purpose for New Jersey's moment of silence law is pretextual is clear from the law's origins in the Supreme Court's prayer decisions. *Cf. Widmar*, 454 U.S. at 27 n.10 (preexisting policy reflects secular purpose). There is no tradition for a moment of silence. The ostensible pedagogical purpose for the MOS neither predated enactment of this legislation nor this lawsuit, but rather was a post-hoc rationalization. J.S.A. 87a. *See also Duffy*, 557 F. Supp. at 1016 (holding school board failure to discuss secular purposes before adopting moment of silence policy indicated secular justification was "clearly the product of afterthought"). Moreover, while appellants claim the purpose of the statute is secular, the government as *amicus* in support of appellants concedes the purpose is accommodation of prayer—a religious purpose. The government agrees resolution of this case would bear on Congress' authority to legislate vocal prayer, *see* Brief for the United States at 1.

The text of the New Jersey statute also undermines its ostensible secular purpose. First, it is unclear whether the statute requires or permits students to participate, *compare* J.S.A. 29a *with id.* at 94a. If voluntary, the state concedes it is a religious exercise, *see Abington*, 374 U.S. at 224, while leaving weighty "pedagogical" concerns merely to student choice. Whether or not the group contemplation is

[10] For example, in *Stone*, while the Ten Commandments were considered to be a preeminent religious text, the Court recognized there were secular purposes coincident with the posting and study of the Ten Commandments, yet these secular purposes did not save the practice because the actual and preeminent government purpose in posting the commandments was religious.

mandatory for students, according to the circuit, it is required for teachers and principals. *See* J.S.A. 19a (teachers "must permit"). There are no "pedagogical" purposes for requiring teachers statewide to direct group meditation without discretion. Experts below so testified, J.A. 163, particularly regarding the varying pedagogical concerns for students of different ages, and their testimony was found compelling by the district court, J.S.A. 88a. *See generally* J.A. 188-92, 250-57. *See Duffy*, 557 F.Supp. at 1017 (observing that if the moment of silence had a pedagogical purpose, teachers would have discretion over its implementation). Finally, to the extent group silence might be useful for pedagogical purposes, (though no evidence on this question was presented to the New Jersey legislature), such opportunities predate the instant Act, require no statute, and thus could adequately be served by other methods not violative of the Constitution. J.A. 265.

The district court held, relying on expert testimony, J.A. 229, and the court of appeals affirmed, that there was no secular purpose for the New Jersey statute. To the contrary, the New Jersey statute was found simply to be a ruse to circumvent this Court's decisions. *See* J.S.A. 27a, 28a, 87a, 94a. When the context and legislative history of a statute indicate religious purposes, and "the secular purpose articulated by the legislature is merely a 'sham,'" *Wallace*, 105 S. Ct. at 2494 (Powell, J., concurring), the Court will not defer to a pretextual secular purpose. *See, e.g., Stone*, 449 U.S. at 41-42; *Abington*, 374 U.S. at 223. The district court below found that like the Alabama statute in *Jaffree*, the New Jersey MOS law has a religious purpose and no secular purpose. This finding was supported by the evidence and should be affirmed.

B. Implementation of the New Jersey Moment of Silence Law Involves the New Jersey Public Schools in the Advancement of Religion in Violation of the First Amendment Establishment Clause.

1. The highest establishment standard applies in this case because New Jersey has endorsed prayer for children in the public schools.

The effect of advancing religion is not a question of fact but of law. *See Jaffree*, 105 S. Ct. at 2500. The highest level of scrutiny

must be applied in this case because the Moment of Silence law legislates as to children and the public schools. At issue is a twofold aid to religion—the government's objective assistance, and the symbolic effect of such assistance on young and impressionable children. Where children are concerned, even the risk of appearance of advancing religion is problematic. *See Grand Rapids*, 105 S. Ct. at 3225-3226, 3230; *Aguilar v. Felton*, 105 S. Ct. 3232, 3237 (1985). *See also Meek v. Pittenger*, 421 U.S. 349 (1975).

Eschewing the Court's standard set in *Grand Rapids* and *Aguilar*, providing that the risk of advancing religion is impermissible, the circuit court held the moment of silence did not advance religion because its effect was not religious "for all pupils." J.S.A. 19a. The court went on to analogize the instant law to the pledge of allegiance and found excusal of nonparticipating students a remedy sufficient to mitigate any effect of advancing religion. Yet, whether a statute is voluntary is immaterial to its effect of advancing religion. Legislated vocal school prayer was held unconstitutional despite its voluntariness. Excusal is simply not a constitutionally sufficient remedy for an establishment clause violation. *Engel*, 370 U.S. at 430; *see Jaffree*, 105 S. Ct. at 2491. Moreover, insofar as the New Jersey Moment of Silence law has a religious purpose, it is completely distinguishable from the pledge of allegiance which has the secular purpose of advancing civic beliefs. *See West Virginia v. Barnette*, 319 U.S. 624, 633-634 (1943). Before the Court therefore is the effect of advancing religion in the public schools of a statute with a conceded religious purpose. Such religious purpose to endorse prayer is a good first indicator of its intended effect. *See, e.g., Stone*, 449 U.S. at 42; *Beck*, 548 F. Supp. at 1165.

2. The New Jersey Moment of Silence Law endorses prayer by providing the aid of state employees and the public schools.

The New Jersey Moment of Silence law has the effect of advancing religion in at least two different ways.

Bill 1064 is a symbol of organized school prayer. Its origins as reflected in its context and legislative history lie not in any tradition

of contemplation, *cf. Marsh v. Chambers*, 463 U.S. 783 (1983), but rather in the prayer laws struck by this Court in the 1960's. Given the utter absence of any independent tradition for silent meditation, Bill 1064 stands only as an eloquent symbol of its legislative history—a substitute for vocal school prayer.

The New Jersey Moment of Silence law's statutory terms also reflect this symbolic meaning. As Rev. George D. Younger testified below, one of the theologically accepted definitions of "contemplation" is prayer. "Both meditation and contemplation . . . have a religious significance in our culture." J.A. 34. *See also* J.A. 139-140; 11 Encyclopaedia Judaica 1218 (1971) (describing meditation as a "term . . . referring to protracted concentration of thought on supernatural lights of the divine world, and of the spiritual worlds in general").

Furthermore, silent prayer retains the objective signs of organized vocal prayer: a group leader, a prescribed time and place, a student congregation, head bowing, clasping of hands. The repeated ritualized meditation in a group with the teacher leading has the inevitable effect of advancing prayer.

The state here is providing assistance—the use of its schools, employees and compulsory attendance laws—to promote prayer, a religious practice. This endorsement of prayer is a "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948). *See also Epperson*, 393 U.S. at 108-109; *Abington*, 374 U.S. at 223. Even if the prayer involved is silent, governmental endorsement is impermissible. *Compare Abington*, 374 U.S. 203 (barring vocal Bible reading) *with Stone*, 449 U.S. at 42 (striking the posting of Ten Commandments: "nor is it significant that the Bible verses involved in this case are merely posted on the wall rather than read aloud").

The coercive aid of the compulsory school attendance laws, which gather the student congregation, *McCollum*, 333 U.S. 203, 209-210, and the assistance of teacher monitoring, *Abington*, 374 U.S. at 225, are impermissible. These benefits are distinguishable from the *de minimis* indirect aid cases relied upon by appellants. *See*

Brief for the United States at 22, *relying on Mueller* v. *Allen*, 463 U.S. 388 (1983). In such "indirect" aid cases, the government has utilized "primarily secular means to accomplish a primarily secular end, and no 'primary effect' of advancing religion has thus been found." *Grand Rapids*, 105 S.Ct. at 3228. Relying on this rationale, the Court has upheld programs providing secular textbooks and bus transportation to nonpublic school students. *Id.* In contrast, use of public school teachers has been held to run the risk of promoting religious doctrine and proselytizing in violation of the establishment clause. J.A. 45. *See Grand Rapids*, 105 S. Ct. at 3227, 3229.

Bill 1064's unconstitutional advancement of prayer and religion is not hypothetical. The statute was implemented unconstitutionally. Teachers, students and the public understood the law to require students to pray. And, there was considerable evidence that teachers encouraged or coerced students to pray. J.S.A. 76a, 79a; J.A. 38-46. Teachers such as Jeffrey May were disciplined for not directing students to observe the law, J.S.A. 39a-49a, while students were disciplined for failing to comply with the statute. J.S.A. 76a-77a; J.A. 29, 30, 33, 38, 41. *See Grand Rapids*, 105 S. Ct. at 3225, 3226; *see also Walter v. West Virginia Board of Education*, 610 F. Supp. 1169, 1173 (S.D.W. Va. 1985); *Gaines v. Anderson*, 421 F. Supp. 337, 340 n.4 (D. Mass. 1976). As declared in *Jaffree*, "the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray." *Id.* at 2499.

3. The New Jersey Moment of Silence law also provides the symbolic message of state endorsement of prayer.

Compounding the objective aid to religion afforded by the public school premises, compulsory attendance laws and teachers which advance prayer is Bill 1064's symbolic effect. The New Jersey MOS law would be implemented in both public elementary and secondary schools where students are young and impressionable. "The inquiry into this kind of (symbolic effect) must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids*, 105 S.

Ct. at 3226. *Cf. Widmar*, 454 U.S. at 274; *Marsh*, 103 S. Ct. at 3335 (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). The youth and impressionability of the students in the New Jersey public schools enhances the effect of school endorsement of prayer pursuant to this Act. This greater effect on children was recognized by the Court in *Jaffree*, 105 S. Ct. at 2503 (O'Connor, concurring), and dates back to the Court's consideration of vocal school prayer. *See Abington*, 374 U.S. at 203; *Engel*, 370 U.S. 421; *McCollum*, 333 U.S. 203. "The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Jaffree*, 105 S. Ct. at 2499. It distinguishes the MOS from those cases upon which appellants would rely. *See* Brief of Appellant at 42.

Students in New Jersey will understand what the public understands—that the legislature's purpose was to promote prayer in the public schools. J.A. 237, 257. In addition, because of their youth and impressionability, students feel compelled to pray when teachers or other students pray. J.A. 32-33, 165, 172, 199, 302, 305. *See Grand Rapids*, 105 S. Ct. 3226; *Walter*, 610 F. Supp. at 1172-73 (praying student harasses nonpraying student with anti-Semitic epithet). As the Court noted in *Jaffree*:

> That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

105 S. Ct. at 2492 n.51.

4. The New Jersey Moment of Silence law prefers certain prayer over others.

Without regulations, the New Jersey moment of silence's implementation was left up to each local school board, thereby putting the minority at the mercy of the majority. J.A. 233. *See* Stone, *In Opposition to the School Prayer Amendment*, 50 U. Chi. L. Rev. 823, 842 (1983). At its best the MOS' implementation is nonsectar-

ian—producing an official folk religion. As found by the district court, such implementation is coercive for those who either "profess no religion and to whom any form of prayer is offensive," J.S.A. 97a; those who believe the state should "have no part in religious matters," *id.* at 95a; and those whose practices involve other kinds of prayer. *See id.* at 96a. The statute may actually threaten observance of other faiths. *Compare* New Jersey's MOS *with* Va. Code § 2.1-203 (1980) (barring hand gestures). *See also* Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1065 (1963). At its worst, the MOS' implementation is sectarian—a mere fr[illegible] of the religious practices of teachers or a principal. At least one commentator has noted the brevity of the "moment" of silence impliedly allows only for certain Christian prayers, e.g., the Lord's prayer—and not for those of other denominations; thus preferring Christianity over non-Christianity. Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874, 1886 n.76 (1983).

C. Implementation of the New Jersey Moment of Silence Law Requires Excessive Administrative Entanglement of the State in Religious Matters.

State assistance to religion through public school teachers involves excessive entanglement in violation of the first amendment.[11] "[B]ecause assistance is provided in the form of teachers, ongoing inspection is required to insure the absence of a religious message." *Aguilar*, 105 S. Ct. at 3238.

In *Lemon*, this Court found the supervision necessary to ensure that teachers in parochial school were not conveying religious messages to their students would constitute excessive entanglement:

> Unlike a book, a teacher cannot be inspected once to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the first amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

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[11] The political divisiveness considered by the circuit, *see* J.S.A. 17a, is only one of two entanglement concerns; *amici* focus here on the state's entanglement in the administration of assistance to religion. *See Aguilar*, 105 S.Ct. at 3237, *citing McCollum*, 333 U.S. at 212.

Aguilar, 105 S. Ct. at 3237, 3238, *citing Lemon*, 403 U.S. at 619.

The numerous entanglement problems posed by the MOS were attested to below. J.A. 27. Principals would have to monitor teachers to ensure they are ideologically neutral. *See Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981); *Duffy v. Las Cruces*, 557 F. Supp. at 1021. Ironically, teachers would even have to monitor students to ensure voluntariness. *See, e.g., Lubbock v. Lubbock*, 669 F.2d 1038, 1047 (5th Cir. 1982); *Karen B.*, 653 F.2d at 902. In general, New Jersey parents oppose public school teacher control over religious education. J.A. 45.

II. THE NEW JERSEY MOMENT OF SILENCE LAW IS NOT AN ACCOMMODATION STATUTE NEEDED FOR FREE EXERCISE.

As discussed above, the New Jersey Moment of Silence law is unconstitutional because of its intent and effect to endorse prayer. Nor may it be saved by a free exercise interest. The statute is not necessary and, thus, goes beyond accommodation—to promote prayer and religion.

In evaluating the Alabama silent prayer statute, the *Jaffree* Court indicated that to the extent the purpose of the law was to accommodate prayer it was not required as a free exercise matter and was therefore an endorsement of religion. A majority of the justices held there was no preexisting government burden on free exercise of religion without moment of silence statutes and therefore, such legislation was not a necessary accommodation. *See* 105 S. Ct. at 2491 n.45; *id.* at 2504, 2505 (O'Connor, J. concurring). *See also Abington*, 373 U.S. at 299 (Brennan, J., concurring); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); Stone, *In Opposition to the School Prayer Amendment*, 50 U. Chi. L. Rev. at 830.

Yet, the circuit and Solicitor General would characterize the New Jersey Moment of Silence statute as an accommodation statute necessary for "neutrality" in the schools. The court of appeals suggests the MOS balances out the present prohibition on school prayer: "the state equally injects itself into religious matters when it desig-

nates a time and place when children and teachers may not pray," J.S.A. 22a, implying the prohibition of organized school prayer is in and of itself an establishment of religion imposed by the Court. Similarly the Solicitor would characterize the MOS as "legislation removing obstacles to wholly voluntary religious observance." Brief for the United States at 24.

Bill 1064 cannot be defended as an act of religious neutrality. *See Epperson*, 393 U.S. at 109. There is no burden or obstacle on prayer—whether vocal or silent. In evaluating this claim in the school prayer cases and most recently as concerned silent prayer in *Jaffree*, the Court rejected the notion that barring organized prayer during the school day burdens free exercise. *See Abington*, 374 U.S. at 299. The school day runs only from nine in the morning to three in the afternoon, leaving many other opportunities for organized prayer. In New Jersey, as in Alabama, "there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day. . . . " *Jaffree*, 105 S. Ct. at 2491 n.45. Individual prayer is always available in the public schools; group prayer is available after school hours, or off school premises. In rejecting government accommodation of group prayer on school premises during the school day, Justice O'Connor noted:

> Of course, the state might argue that [the law] protects not silent prayer, but rather group silent prayer under state sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State . . . but by the Establishment Clause as interpreted in *Engel* and *Abington*.

Id. at 2505 (O'Connor, J., concurring).

The prohibition on school prayer, the Court has held, is not inconsistent with the twin religion clause mandates: "There was no need to 'accommodate' or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the free exercise clause." *Jaffree*, 105 S. Ct. at 2491 n.45. "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice

its beliefs."[12] *Abington*, 374 U.S. at 226. (emphasis in original).

Those who support the instant Act as an accommodation reject the possibility of neutrality in the public schools. Their premise is that the public schools should not be free of organized prayer as this Court sought in the 1960's—but only that the assistance to prayer be "equal." So long as participating students may bow their heads and think of something else, they contend, the state's assistance to religion has been impartial. *See* Brief for the United States at 28-30. Yet the notion that government may assist religion—so long as it is impartial—has not and will not constitute neutrality in the public schools. Unlike indirect financial aid, the assistance provided organized prayer in the public schools is coercive and direct. Neutrality requires the public schools to eschew organized prayer. Public education in this country need not adopt a viewpoint on religion; it may remain nonreligious—and thus neutral, because there are alternatives to the public schools for the exercise of group prayer.

In considering the constitutionality of moment of silence legislation in *Jaffree*, this Court indicated its commitment to neutrality in the public schools. "[T]he individual freedom of conscience protected by the first amendment embraces the right to select any religious faith or none at all." This is the freedom which is threatened by the instant New Jersey Moment of Silence law. Neither the putative pedagogical secular purposes for moments of silence nor the conflicting claims of accommodation for prayer are adequate to justify the law. New Jersey's MOS is nothing other than a legislative substitute for the vocal prayer statutes found unconstitutional by the Court in the 1960's. This Court ought similarly to hold it unconstitutional.

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[12] The Solicitor General errs in analogizing this case to those involving military schools, Brief for the United States at 1, for there are different free exercise issues where government has imposed military obligations with consequent constraints on free exercise options, *see Abington*, 374 U.S. at 299 (Brennan, J., concurring).

CONCLUSION

For all the reasons discussed above we respectfully ask that the decision of the Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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No. 85-1551

In The

Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, et al.,

Appellants,

v.

JEFFREY MAY, individually, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE NEW JERSEY COUNCIL OF CHURCHES NEW JERSEY ASSOCIATION OF REFORM RABBIS NEW JERSEY-WEST HUDSON VALLEY COUNCIL OF THE UNION OF AMERICAN HEBREW CONGREGATIONS IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a New Jersey statute requiring public school teachers to "permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection" violates the establishment clause of the first amendment to the Constitution.

SUMMARY OF ARGUMENT

Amici, New Jersey churches and synagogues, are the intended beneficiaries of this law designed to encourage school prayer. Amici reject as unconstitutional and improper this supposed "accommodation" which is instead a governmental usurpation of religious authority.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
SUMMARY OF ARGUMENT	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
ARGUMENT	2
CONCLUSION	4

TABLE OF AUTHORITIES

United States Constitution, First Amendment	3
N.J.S.A. 18A:36-4	3
Drakeman, *Is New Jersey's Moment of Silence Law Constitutional?* 35 *Rutgers Law Review* 341 (1983)	4

INTEREST OF AMICI CURIAE

Amici Curiae are three organizations that represent an extremely broad spectrum of Jewish and Christian clergy and laity. Members of Amici Curiae organizations include: the New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations and the New Jersey Association of Reform Rabbis, the principal associations of Reform Judaism congregations in New Jersey; and the New Jersey Council of Churches, the most diverse ecumenical Protestant organization in the State of New Jersey, which has the following members:

Presbyterian Church USA

Episcopal Church

United Methodist Church

United Church of Christ

Lutheran Church in America

American Baptist Churches of New Jersey

General Baptist Convention of New Jersey

Reformed Church in America

African Methodist Episcopal Church

African Methodist Episcopal Zion Church

Union American Methodist Episcopal Church

Christian Church

Christian Methodist Episcopal Church

The Salvation Army

Religious Society of Friends

These organizations regularly study and take positions on social and political issues, particularly ones dealing with the religious activity of governmental bodies. Since this case will significantly affect the relationship of church and state in New Jersey and across the nation, Amici have united in this brief to express their concern that this Court keep religion and government in proper balance.

———o———

ARGUMENT

Amici urge this Court to strike down New Jersey's "moment of silence" law as an unconstitutional establishment of religion. Rather than burden this Court with a repetition of the many compelling constitutional arguments in opposition to this law, Amici wish to express their special viewpoint as representatives of a vast spectrum of New Jersey's religious community about why our legislators' efforts to encourage school prayer are both improper and unconstitutional.

Amici are responsible, in many respects, for the prayers of a vast number of Protestant and Jewish children in New Jersey's public schools. Through the thousands of clergy and millions of laity associated with our member churches and synagogues, we are on the front-lines of the battle to instill religion and prayer in our children. New Jersey's legislature has sought to aid this effort by putting the weight of the public schools behind the act of prayer. We have spurned this help for one crucial reason—The power to encourage prayer is the power to control prayer. Today that power may ostensibly be used to help us; tomorrow, it may be turned against us.

The First Amendment's religion clauses must ensure that the government cannot exert control over religion—pro or con.

This need not result in a governmental hostility to religion, though, and the free exercise clause may even require the government to accommodate religious activity where it might otherwise be forbidden (military chaplains, for example). But this accommodation is only proper in response to a valid, indeed compelling, free exercise right. The claims of the free exercise clause may outweigh those of the establishment clause, but where there is no free exercise claim, there can be no accommodation of religion. Any attempted accommodation without a free exercise claim is an unconstitutional endorsement of religion.

This is not an "equal access" case in which children ask for the opportunity to pray while their classmates are free to choose other extracurricular activities. Although the legislators have tried to make this law appear student-initiated by using the words "*shall permit* students to observe a 1 minute period of silence," N.J.S.A. 18A:36-4, this contemplative moment will necessarily take place when students no longer have freedom of choice over their activities. They will be under the control and authority of their teachers. Accordingly, the "shall permit" language is a red herring since it would be ludicrous to suggest that school children really want peace and quiet but their teachers, absent this statute, would forbid the students' silence. The statute will inevitably create a mandatory official devotional moment at the opening of the school day.

This law cannot be divorced from a culture that saw decades of prescribed prayers at the very same time of the

school day and from the 17 predecessor bills since 1970 that have sought to bring religion back into New Jersey's public schools. By passing the religiously motivated moment of silence law, the government has become nothing more than a sponsor of one particular form of sectarian religious activity. This the Constitution forbids. See Drakeman, "Is New Jersey's Moment of Silence Law Constitutional?" 35 *Rutgers Law Review* 341 (1983).

Finally, Amici are profoundly troubled by the extraordinary, and misplaced, emphasis the legislators have placed on prayer as a panacea for society's ills. Amici will be the first to admit to the power of prayer, but the role of the legislature is not to serve as priest or prophet but to find concrete solutions to the plethora of social problems facing this State. To attempt to cure New Jersey's problems by introducing prayer into the schools is not only to misuse prayer by employing it as a means of social control, but also to disregard the depth of the social problems and the need for a tangible response to them.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit, holding the moment of silence law to be unconstitutional, should be affirmed.

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